
**RECLAIMING STATES' RIGHTS:
STATES AS DRIVERS OF NATIONAL CONSTITUTIONAL CHANGE**

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A Senior Essay

Written in Partial Fulfillment of the Requirements for the Degree of
Bachelor of Arts in Political Science (Intensive)

Department of Political Science

Yale University

April 26, 2024

TABLE OF CONTENTS

INTRODUCTION	1
CHAPTER ONE: STATES AS DRIVERS OF NATIONAL CONSTITUTIONAL AMENDMENTS	7
Introduction.....	7
I. The State Origins of the Bill of Rights.....	9
II. States as Pioneers of Reconstruction Amendments.....	14
III. States as Pioneers of Progressive Era Amendments.....	17
IV. States as Pioneers of Modern Amendments.....	22
V. Looking to the Future: Deriving New Constitutional Amendments from Existing State Provisions.....	25
Conclusion.....	29
CHAPTER TWO: MAKING STATES COUNT: COUNTING STATE PRACTICES TO DETERMINE NATIONAL CONSTITUTIONAL RIGHTS	31
Introduction.....	31
I. Examples of State Counting in Supreme Court Jurisprudence.....	32
A. The Exclusionary Rule.....	32
B. Incorporation.....	36
C. Identifying Unenumerated Rights.....	38
II. Theoretical Bases for Counting State Practices.....	41
III. Rules for State-Counting Analyses.....	43
A. Existing Scholarship on State-Counting Questions.....	43
B. A New Approach to State Counting.....	48
C. Responses to Potential Concerns About the Article V and Section 5 Rules.....	50
IV. Recognizing New Rights: Applying the Article V and Section 5 Rules.....	54
Conclusion.....	56
CHAPTER THREE: COUNTING STATE PRACTICES TO DETERMINE “UNUSUAL” SENTENCES UNDER THE EIGHTH AMENDMENT	59
Introduction.....	59
I. The Meaning of “Unusual”.....	60
II. Analyzing the Court’s State Counting for Criminal Sentences.....	62
III. Questions About Counting Methodologies.....	69
Conclusion.....	73
CONCLUSION	75
ACKNOWLEDGMENTS	79

INTRODUCTION

States' rights have been central to constitutional and political debates since our nation's Founding. Yet the term can carry a negative connotation today, especially amongst progressives, for understandable historical reasons.¹ After all, states' rights have been invoked numerous times to oppose constitutional developments, starting with the Constitution's ratification. In the first of a series of essays arguing against ratification, an Anti-Federalist using the pen name "Brutus" admonished that if the new national government's powers were "capable of being executed, all that is reserved for the individual states must very soon be annihilated," save some basic governmental functions.² An "annihilation" of state powers would have represented a complete reversal from the government under the Articles of Confederation, which was "nothing more than a tight treaty among thirteen otherwise independent states"³

Eighty years later, opponents of the Reconstruction Amendments also based their arguments on states' rights. Both supporters and opponents of the Thirteenth Amendment—which abolished slavery and gave "Congress . . . power to enforce [the Amendment] by appropriate legislation"⁴—recognized that it would transfer significant power over civil-rights enforcement from the states to the federal government.⁵ Not only did the Amendment's opponents reject this shift, but some even argued that the congressional-enforcement provision was unconstitutional.⁶ For example, Democratic Rep. Fernando Wood of New York asserted that "[t]he control over

¹ Heather K. Gerken, *Distinguished Scholar in Residence Lecture: A User's Guide to Progressive Federalism*, 45 HOFSTRA L. REV. 1087, 1087–88 (2017).

² Brutus, *Essay I* (Oct. 18, 1787), in *THE ANTI-FEDERALIST: AN ABRIDGEMENT*, BY MURRAY DRY, OF THE COMPLETE ANTI-FEDERALIST 108, 110 (Herbert J. Storing ed. 1985).

³ Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 465 (1994).

⁴ U.S. CONST. amend. XIII, § 2.

⁵ William M. Carter, Jr., *The Thirteenth Amendment and Constitutional Change*, 38 N.Y.U. REV. L. & SOC. CHANGE 583, 586 (2014).

⁶ George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1380–82 (2008).

slavery . . . was not and never was intended to be delegated to the United States, and cannot now be delegated except by the consent of all the States.”⁷ Without necessarily claiming that the Fourteenth and Fifteenth Amendments were unconstitutional, congressional Democrats nevertheless decried them as an egregious infringement upon the states’ long-standing control over the contours of citizens’ rights.⁸

The use of states’ rights to oppose racial equality did not end there. It figured prominently in southern governors’ opposition to allowing Black students to attend public schools⁹ and congressional opposition to the Civil Rights Act of 1964,¹⁰ among other civil-rights legislation. Based on the invocation of states’ rights to oppose the Reconstruction Amendments and the Civil Rights Movement, William Riker once remarked that “if in the United States one disapproves of racism, one should disapprove of federalism.”¹¹

While we cannot ignore how states’ rights have been wielded odiously, we also should not let opponents of racial equality monopolize the idea. This Essay endeavors to fight back against negative associations with states’ rights not by justifying its past invocations, but by demonstrating how federalism has been and can be used to expand rights and drive national constitutional change.

This Essay builds on excellent federalism scholarship by distinguished scholars and jurists. Heather K. Gerken has described associations of states’ rights purely with opposition to civil rights

⁷ *Id.* at 1381 (quoting CONG. GLOBE, 38th Cong., 1st Sess. 2941 (1864)).

⁸ ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 86, 120 (2019).

⁹ *See generally Fighting Back (1957-1962): Transcript*, PBS (Apr. 4, 2021), <https://www.pbs.org/video/fighting-back-19571962-0wxrvc/>.

¹⁰ *See, e.g., Text of Goldwater Speech on Rights*, N.Y. TIMES (June 19, 1964), <https://www.nytimes.com/1964/06/19/archives/text-of-goldwater-speech-on-rights.html> (“I find no constitutional basis for the exercise of Federal regulatory authority in [public accommodations and employment]; and I believe the attempted usurpation of such power to be a grave threat to the very essence of our basic system of government, namely, that of a constitutional republic in which 50 sovereign states have reserved to themselves and to the people those powers not specifically granted to the central or Federal Government.”).

¹¹ WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 155 (1964).

as “your father’s federalism,”¹² instead championing a “nationalist school of federalism” that recognizes how “[s]tates now serve demonstrably national ends and, in doing so, maintain their central place in a modern legal landscape.”¹³ Chief Judge Jeffrey S. Sutton has written two superb books about how state courts have influenced the U.S. Supreme Court’s recognition of national constitutional rights, and how states have shaped the federal government’s structure, respectively.¹⁴ And Justice William J. Brennan, Jr.¹⁵ and Emily Zackin¹⁶ have analyzed powerfully how state constitutions far surpass the national constitution with respect to positive-rights guarantees.

I agree with Gerken’s reframing of federalism and emphasis on its national import, as well as Sutton’s, Brennan’s, and Zackin’s exhortations for legal practitioners and scholars to pay more attention to state constitutions. Yet this Essay adopts a different approach to preaching these messages. Instead of focusing on policy innovations or ways in which federal courts have adopted rationales first promulgated at the state level, I seek to highlight how specific provisions of the U.S. Constitution welcome—or even compel—interpreters and constitutional actors to consult and rely on state practices, laws, court rulings, and constitutions.

Chapter One focuses on Article V’s requirement that three-fourths of states ratify constitutional amendments for them to take effect.¹⁷ This formal requirement has broader structural implications: successful amendments often achieve national adoption following the enactment of

¹² Gerken, *supra* note 1, at 1094.

¹³ Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1917–18 (2014). Gerken’s observation about states’ role in our governmental system resembles James Madison’s words in *The Federalist* No. 45: “state governments may be regarded as constituent and essential parts of the federal government” THE FEDERALIST NO. 45, at 240 (James Madison) (George W. Carey & James McClellan eds., 2001).

¹⁴ JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018); JEFFREY S. SUTTON, WHO DECIDES?: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2021).

¹⁵ See generally William F. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

¹⁶ See generally EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS (2013).

¹⁷ U.S. CONST. art. V.

similar provisions at the state level. Notably, states have pioneered constitutional amendments throughout our nation’s history, ranging from the Bill of Rights to some of the most recent amendments. This historical pattern provides a template for hypothesizing about what future amendments may be adopted. This Chapter makes a unique contribution to existing scholarship by synthesizing the stories of individual amendments into a cohesive narrative about state innovations leading to national changes—all but one of which have expanded individual rights.¹⁸

While Chapter One focuses on Article V’s textual requirements for amending the Constitution, Chapter Two discusses how the U.S. Supreme Court has counted state practices to determine whether rights not protected explicitly by the Constitution still deserve national constitutional protection. I analyze Court cases exemplifying the state-counting methodology and present the most persuasive scholarly defenses of this practice. Based on the merits and shortcomings of existing state-counting proposals, I propose a novel framework for future state-counting endeavors: the Article V Rule, which mirrors state support for a constitutional amendment to protect a right;¹⁹ and the Section 5 Rule, which mirrors the congressional and presidential approval needed for Congress to recognize rights under the Fourteenth Amendment.²⁰ Rights satisfying either Rule in either 1868 or the present merit constitutional protection.

This framework provides clear, administrable Rules with the dual advantages of constraining judicial policymaking and fully embracing the Constitution’s mechanisms for recognizing new rights. These benefits contrast with existing Court doctrine, which does not provide clear guidance on the appropriate thresholds and timing for a state-counting analysis.²¹

¹⁸ The exception is the Eighteenth Amendment’s enactment of Prohibition, which states led the effort to repeal via the Twenty-First Amendment. U.S. CONST. amend. XVIII, *repealed by id.* amend. XXI, §1.

¹⁹ *See id.* art. V.

²⁰ *See id.* amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

²¹ *See, e.g.,* Roderick M. Hills, Jr., *Counting States*, 32 HARV. J. L. & PUB. POL’Y 17, 23 (2009) (noting “the Court’s notorious casualness in how it tallies states”).

Moreover, existing state-counting proposals reflect one but not both of my proposed Rules' two advantages.

Chapter Three turns to state counting under an additional constitutional provision: the Eighth Amendment's prohibition on "cruel and unusual punishments"²² Here, I supplement existing scholarship by presenting a numbers-driven approach to state counting in this area. After analyzing debate over the Eighth Amendment's "unusualness" requirement, I present a table of notable cases. This table shows the number of states opposing a practice in each case and whether that number was sufficient for the Court to strike down a sentencing regime. I then analyze questions scholars have raised about how to count states, demonstrating the applicability of my Article V and Section 5 Rules in Eighth Amendment cases and critiquing the Court's citation of state trends. My broader aim is to encourage jurists, scholars, and litigants to be more specific and rigorous in their state counts.

The Conclusion summarizes the three Chapters' key insights and unique contributions to existing scholarship on federalism and constitutional law. It also highlights one further area in which states can have national influence: procedures and voter qualifications for national elections, which the Constitution gives states significant discretion in determining.²³

Each chapter utilizes a slightly different approach. Chapter One crafts a historical narrative of states influencing constitutional amendments since the Founding, using empirical data on state practices. Chapter Two contains the most argumentative and interpretation-focused parts of this Essay. While Chapter Three includes some legal commentary on how courts should and should not

²² U.S. CONST. amend. VIII. The full text reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

²³ See *id.* art. I, § 4, cl. 1 (federal legislative-election procedures); *id.* art. II, § 1, cl. 2 (procedures for selecting Electoral College members); *id.* art. I, § 2, cl. 1 (U.S. House election voter qualifications); *id.* amend. XVII, § 1 (U.S. Senate election voter qualifications).

count states, its main contribution is its extraction of data from the Court's Eighth Amendment cases and analysis of how the Court has used state counting.

Despite these varying approaches to how the Constitution empowers states to have a national impact, one consistent theme emerges throughout this Essay: states can and have played a role in expanding rights instead of contracting them, and driving national constitutional change instead of obstructing it. Those looking to effectuate future constitutional change would be wise to pay close attention to state constitutions, state laws, and state practices.

CHAPTER ONE: STATES AS DRIVERS OF NATIONAL CONSTITUTIONAL AMENDMENTS

INTRODUCTION

The Constitution represented a profound transfer of sovereignty. The Articles of Confederation explicitly declared that “[e]ach state retains its sovereignty, freedom and independence.”¹ In contrast, the Constitution established from the beginning that “We the People,” not the states, were sovereign.² To achieve ratification of this transformation, the Constitution preserved states’ powers in several ways. One such power comes from Article V, which establishes that “Congress . . . on the Application of two thirds of the several States, shall call a Convention for proposing Amendments” and requires three-fourths of states to ratify amendments before they take effect.³

Article V’s importance in protecting states’ interests vis-à-vis the federal government was understood amidst debate over the Constitution’s ratification. In *The Federalist* No. 85—the final essay in the collection—Alexander Hamilton argued that with the Article, “We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority.”⁴ Meanwhile, future Supreme Court Justice James Iredell argued at the North Carolina ratifying convention that “[i]t is highly probable that amendments agreed to . . . would be conducive to the public welfare, when so large a majority of the states consented to them.”⁵ Iredell’s remarks highlight an additional influence of states beyond formally calling for a

¹ ARTICLES OF CONFEDERATION of 1781, art. II.

² U.S. CONST. pmb. *See also* AKHIL REED AMAR, *THE LAW OF THE LAND: A GRAND TOUR OF OUR CONSTITUTIONAL REPUBLIC* 17–18 (2015) (arguing that states were sovereign before the Constitution’s ratification but not afterward, in response to President Abraham Lincoln’s claim that no states except Texas were ever sovereign).

³ U.S. CONST. art. V.

⁴ *THE FEDERALIST* No. 85, at 457 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

⁵ *Debate in North Carolina Ratifying Convention* (July 29, 1788), in 4 *THE FOUNDERS’ CONSTITUTION* 582, 583 (Philip B. Kurland & Ralph Lerner eds., 1987).

convention or ratifying amendments. Because amendments require states' consent, those seeking to amend the Constitution will likely draft language that they believe states will support. In other words, the states' role in approving amendments at the end of the Article V process leads to their influence at the beginning of the amendment process—even if Congress submits language to the states. Thus, as a historical matter, “most of the federal amendments that have thus far succeeded were copycats or adaptations of preexisting state constitutional texts or practices.”⁶

This Chapter explores states' role in this regard. A few notes at the outset. First, while states can create national change by inspiring all forms of constitutional amendments, most of the amendments discussed below concern individual rights as opposed to structural changes. After all, the vast majority of constitutional amendments have affected rights. However, I admit to selecting the sixteen amendments that best exemplify state influence nationally;⁷ why the eleven other amendments derived less from state innovations is outside this Essay's scope.⁸ Second, the story of states driving change via Article V almost always takes the form of rights-expanding amendments. The one exception is the Eighteenth Amendment's enactment of Prohibition, which restricted “the manufacture, sale, or transportation of intoxicating liquors.”⁹ And even there, states led the drive to repeal that amendment—and thus restore the rights taken away—within two decades.¹⁰ Third, the structure-focused amendments discussed in Part V and the Conclusion still implicate individual rights in some ways.

I proceed in five Parts. Part I traces provisions in the Bill of Rights to state constitutional and legislative protections that preceded it. Parts II, III, and IV move beyond the first ten

⁶ AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 467 (2012).

⁷ I analyze the state origins of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Thirteenth, Fifteenth, Seventeenth, Eighteenth, Nineteenth, Twenty-First, Twenty-Fourth, and Twenty-Sixth Amendments.

⁸ For a brief discussion of this issue, see *infra* note 154 and text accompanying notes 152–154.

⁹ U.S. CONST. amend. XVIII, § 1, *repealed by id.* amend. XXI, §1.

¹⁰ See *infra* text accompanying notes 90–99.

amendments by discussing how states pioneered amendments during Reconstruction, the Progressive Era, and the second half of the twentieth century, respectively.¹¹ These four Parts suggest more broadly that to predict future amendments, we should look at existing state practices. Part V follows these lessons in examining three structural practices (with rights implications) in states that the national government may seek to emulate. Although this Chapter builds on existing historical research on individual amendments, it offers a unique contribution in synthesizing these amendments’ stories into a cohesive narrative about states inspiring national constitutional change—almost always for the better.

I. THE STATE ORIGINS OF THE BILL OF RIGHTS

Many scholars have referred to James Madison as the “Father of the Bill of Rights.”¹² This moniker holds inasmuch as Madison introduced what became our first ten constitutional amendments in Congress and played a key role in securing their approval.¹³ Yet arguably, Madison acted more as a midwife.¹⁴ The true progenitors of the Bill of Rights were the American people, acting through the state constitutions they enacted before the Constitution’s ratification.¹⁵ After all, “state bills of rights were emblematic features of pre-1787 state constitutions, ranking high among the best and most popular state practices.”¹⁶ To illustrate states’ influence over the Bill of Rights, I address three forms of historical evidence: the Anti-Federalists’ writings in support of a Bill of Rights; data showing the number of state counterparts to the Bill of Rights’s clauses; and

¹¹ My grouping of amendments follows the structure of Chapters Ten to Twelve in AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* (2005).

¹² See, e.g., Edward A. Hartnett, *A “Uniform and Entire” Constitution; Or, What If Madison Had Won?*, 15 CONST. COMMENT. 251, 251 n.1 (1998) (collecting sources); Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 302.

¹³ Finkelman, *supra* note 12, at 301–04.

¹⁴ I am not the first to characterize Madison in this way. See, e.g., RICHARD BROOKHISER, *JAMES MADISON* 84 (2011).

¹⁵ AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA’S CONSTITUTIONAL CONVERSATION, 1760–1840* 312 (2021).

¹⁶ *Id.*

similarities in the language of state provisions and the first eight amendments to the U.S. Constitution.

Start with the writings of the Anti-Federalists. During the debate over the Constitution's ratification, they explicitly pointed to bills of rights in state constitutions both to justify a federal counterpart and for ideas about what federal protections were necessary. In response to Federalist challenges about the "necessity, or propriety" of a federal bill of rights, the Anti-Federalist Brutus noted that all state constitutions contained either explicit bills of rights or restrictions on governmental power tantamount to such bills.¹⁷ The Federal Farmer echoed these sentiments, worrying that "certain rights which we have always held sacred in the United States, and recognized in all our constitutions . . . will be left unsecured" by the Constitution's ratification.¹⁸

The Anti-Federalists' concerns about the absence of a federal bill of rights were magnified by the Constitution's Supremacy Clause, which provides that the Constitution, federal laws, and treaties are "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."¹⁹ Brutus interpreted the Clause to mean that "the different state constitutions"—including their rights guarantees—could be "repealed and entirely done away" by the national government.²⁰ Given that the ratification of a Bill of Rights was a concession to and victory for the Anti-Federalists²¹—over the initial objection of Federalists like Alexander

¹⁷ Brutus, *Essay IX* (Jan. 17, 1788), in *THE ANTI-FEDERALIST: AN ABRIDGEMENT*, BY MURRAY DRY, OF *THE COMPLETE ANTI-FEDERALIST* 153, 153–54 (Herbert J. Storing ed. 1985).

¹⁸ The Federal Farmer, *Letter IV* (Oct. 12, 1787), in *THE ANTI-FEDERALIST: AN ABRIDGEMENT*, BY MURRAY DRY, OF *THE COMPLETE ANTI-FEDERALIST* 54, 55 (Herbert J. Storing ed. 1985).

¹⁹ U.S. CONST. art. VI, cl. 2.

²⁰ Brutus, *Essay II* (Nov. 1, 1787), in *THE ANTI-FEDERALIST: AN ABRIDGEMENT*, BY MURRAY DRY, OF *THE COMPLETE ANTI-FEDERALIST* 117, 121 (Herbert J. Storing ed. 1985).

²¹ See AMAR, *supra* note 15, at 312, 313 (describing the absence of a national bill of rights as one of the Anti-Federalists' "best talking points" and noting that President George Washington specifically sought to mollify Anti-Federalists by supporting the Bill). In proposing the Bill of Rights in Congress, then-Rep. James Madison also framed it as an olive branch to the Constitution's opponents: "I wish, among other reasons why something should be done, that those who have been friendly to the adoption of this constitution, may have the opportunity of proving to those who were opposed to it, that they were as sincerely devoted to liberty and a republican government, as those who

Hamilton²²—the Anti-Federalists’ repeated invocation of states’ rights protections is particularly significant.²³ It demonstrates that state bills of rights played a key role in securing a national Bill.

Given this historical background, it is unsurprising that the first eight amendments to the Constitution—those that protected specific individual rights²⁴—find myriad parallels in state constitutions. Almost every right protected in the first eight amendments had a state counterpart by 1791, the year of the Bill of Rights’s ratification.²⁵ Based on a comprehensive survey by Steven G. Calabresi, Sarah E. Agudo, and Kathryn L. Dore, Table 1 below shows each individual right by the number of state counterparts it enjoyed by 1791.²⁶ The rows in bold font represent clauses that had counterparts in at least half of the states.

charged them with wishing the adoption of this constitution in order to lay the foundation of an aristocracy or despotism.” 1 ANNALS OF CONG. 449 (1789).

²² See, e.g., THE FEDERALIST No. 84, at 442–51 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

²³ For one argument in favor of paying close attention to the Anti-Federalists’ writings, see Amul R. Thapar & Joe Masterman, *Fidelity and Construction*, 129 YALE L.J. 774, 797–78 (2020).

²⁴ U.S. CONST. amends. I–VIII.

²⁵ See Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition*, 85 S. CAL. L. REV. 1451, 1463 (2012) (featuring a table of “Prevalence of Rights by Number of States,” showing no state counterparts to the Fifth Amendment’s Double Jeopardy Clause). *But see id.* at 1499 (noting that Pennsylvania instituted a double-jeopardy protection in 1790). It appears that the only right in the first eight amendments lacking a state counterpart is the Fifth Amendment’s Grand Jury Clause. *Id.* at 1516.

²⁶ The total number of states included in this analysis is fourteen: the thirteen original colonies and Vermont, which joined the Union in 1791. For the legislation granting Vermont statehood, see Act of Feb. 18, 1791, ch. 7, 1 Stat. 191.

**TABLE 1: STATE COUNTERPARTS OF THE FIRST EIGHT AMENDMENTS'
INDIVIDUAL RIGHTS GUARANTEES IN 1791²⁷**

Clause	Amendment	Number of State Analogs in 1791	Percentage of States
Establishment Clause	First	8	57%
Free Exercise Clause	First	13	93%
Freedom of Speech	First	2	14%
Freedom of Assembly and Petition	First	2	14%
Right to Bear Arms	Second	5	36%
Quartering of Soldiers	Third	5	36%
Unreasonable Searches and Seizures	Fourth	8	57%
Probable Cause Requirement for Warrants	Fourth	8	57%
Grand Jury Indictment	Fifth	0	0%
Double Jeopardy Clause	Fifth	1	7%
Right Against Self-Incrimination	Fifth	8	57%
Due Process Clause	Fifth	9	64%
Takings Clause	Fifth	6	43%
Speedy Trial	Sixth	7	50%
Public Trial	Sixth	2	14%
Vicinage	Sixth	6	43%
Right to Be Informed of Criminal Charges	Sixth	8	57%
Confrontation Clause	Sixth	8	57%
Compulsory Process Clause	Sixth	7	50%
Civil Jury	Seventh	12	86%
Excessive Bail	Eighth	9	64%
Excessive Fines	Eighth	10	71%
Cruel and Unusual Punishment	Eighth	8	57%

Moreover, the text of numerous amendments in the Bill of Rights closely mirrors those of their state counterparts. For example, the Pennsylvania Constitution of 1776 declared “[t]hat the

²⁷ For the source of these data, see Calabresi et al., *supra* note 25, at 1499 (Double Jeopardy Clause); *id.* at 1513–14 (vicinage); *id.* at 1497–98 (Compulsory Process Clause); *id.* at 1467 (all other clauses).

people have a right to bear arms for the defence of themselves and the state,”²⁸ language that resembles the Second Amendment’s protection of “the right of the people to keep and bear Arms” and emphasis on how “[a] well regulated Militia” is “necessary to the security of a free State.”²⁹ Meanwhile, the Massachusetts Constitution of 1780 was “highly influential” on neighboring states and first enshrined the search-and-seizure protections for “houses” that later appeared in the Fourth Amendment.³⁰ Specifically, Article XIV of the Massachusetts Constitution said, “Every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions.”³¹ While the Fourth Amendment replaced “possessions” with “effects,” its language is very similar: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”³² And the 1776 Virginia Declaration of Rights³³ and 1776 Delaware Declaration of Rights³⁴ included language almost identical to the Eighth Amendment’s guarantee that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”³⁵

The Anti-Federalists’ writings, Calabresi, Agudio, and Dore’s historical survey data, and the above textual comparisons all show that state rights protections inspired national constitutional change in the form of the federal Bill of Rights. In just a few years, the Constitution had realized

²⁸ PA. CONST. of 1776, art. XIII.

²⁹ U.S. CONST. amend. II.

³⁰ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 65, 67 (1998).

³¹ MA. CONST. of 1780, art. XIV.

³² U.S. CONST. amend. IV. *See also* AMAR, *supra* note 2, at 241–42 (“The language, logic, and structure of the Massachusetts Constitution’s Article XIV foreshadow the federal Fourth Amendment.”).

³³ VA. DECL. OF RIGHTS § 9 (1776) (“That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

³⁴ DE. DECL. OF RIGHTS § 16 (1776) (“That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.”).

³⁵ U.S. CONST. amend. VIII.

the visions of Hamilton and Iredell that Article V would serve as an important mechanism for state influence nationally.³⁶

II. STATES AS PIONEERS OF RECONSTRUCTION AMENDMENTS

Given that Article V created an explicit role for states in the amendment process, one would expect that states continued to influence constitutional amendments beyond the first ten. It is thus unsurprising that states played an important role in two amendments during our nation’s “Second Founding”³⁷: the Thirteenth Amendment that abolished slavery,³⁸ and the Fifteenth Amendment, which enshrined Black suffrage in the law.³⁹

It may appear odd to discuss the Thirteenth Amendment in a Chapter lauding states’ roles in driving positive national change. To be clear, states are not unblemished heroes of the Amendment’s proposal and ratification. John C. Calhoun wielded states’ rights in defense of slavery,⁴⁰ and the Civil War that begot the Amendment arose from the unconstitutional secession⁴¹ of eleven states.⁴² Nor can some states’ statuses as free before the Civil War be attributed solely to enlightened views on slavery, as opposed to national-government mandates. For example, it was Article 6 of the 1787 Northwest Ordinance⁴³ that barred slavery in the Northwest Territories that

³⁶ See *supra* text accompanying notes 4–5.

³⁷ See ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019).

³⁸ U.S. CONST. amend. XIII, § 1.

³⁹ U.S. CONST. amend. XV, § 1.

⁴⁰ See, e.g., Bert E. Bradley & Jerry L. Tarver, *John C. Calhoun’s Argumentation in Defense of Slavery*, 35 S. J. COMM’N 163, 168 (1969) (discussing how Calhoun championed slavery’s legality by arguing that it was within states’ purview and outside that of the federal government); *Today in History - March 18*, LIBR. OF CONG., <https://www.loc.gov/item/today-in-history/march-18> (last accessed Apr. 14, 2024) (“During the course of his career, he reversed his stand as a nationalist and advocated states’ rights as a means of preserving slavery in the South.”).

⁴¹ See AMAR, *supra* note 11, at 33–39 (explaining why the Constitution’s text, history, and structure reject the lawfulness of secession); *id.* at 354–55 (discussing President Abraham Lincoln’s election and the timeline of secession).

⁴² *Id.* at 354–55.

⁴³ Northwest Ordinance of 1787, art. 6. The full text reads: “There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted: Provided, always, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor

encompassed what later became Illinois, Indiana, Michigan, Ohio, Wisconsin, and a portion of Minnesota.⁴⁴

Yet it remains a historical fact that nineteen of thirty-four states did not permit slavery at the time of President Abraham Lincoln’s March 1861 inauguration.⁴⁵ And by early 1865, when the Thirteenth Amendment was sent for state ratification, seven former slave states had abolished slavery—three Union states bordering the Confederacy and four former Confederate states recaptured by the Union.⁴⁶ Vermont led the way in 1777, before it was officially a state, when it preceded the thirteen original states in banning slavery.⁴⁷ Seven years later, Pennsylvania and all of New England had abolished slavery.⁴⁸ With New York’s passage of a gradual-emancipation law in 1799⁴⁹ and New Jersey following suit in 1804,⁵⁰ all of the northeastern states had enacted abolition provisions by 1804.⁵¹ Gradual emancipation by definition did not mean that all slaves were freed immediately; indeed, it took until 1847 and 1848 for New Jersey and New York, respectively, to end slavery almost entirely.⁵² Still, the two states’ realization of abolition preceded the Amendment’s ratification by nearly two decades. Thus, the Thirteenth Amendment capped a slow process in a majority of states toward abolishing slavery. In doing so, the Amendment “borrowed from the best constitutional practices of various enlightened free states.”⁵³

or service as aforesaid.” Indeed, the Thirteenth Amendment’s drafters based their language on Article 6’s text. *See, e.g.,* AMAR, *supra* note 6, at 262; FONER, *supra* note 37, at 29–30.

⁴⁴ Gavin Wright, *Slavery and the Rise of the Nineteenth-Century American Economy*, 36 J. ECON. PERSPS. 123, 131 (2022).

⁴⁵ FONER, *supra* note 37, at 22.

⁴⁶ *Id.* at 37.

⁴⁷ MANISHA SINHA, *THE SLAVE’S CAUSE: A HISTORY OF ABOLITION* 67 (2016).

⁴⁸ *Id.* at 76.

⁴⁹ *See, e.g., id.* at 82; AMAR, *supra* note 11, at 352; Wright, *supra* note 44, at 131.

⁵⁰ *See, e.g.,* SINHA, *supra* note 47, at 84; AMAR, *supra* note 11, at 353; Wright, *supra* note 44, at 131.

⁵¹ Wright, *supra* note 44, at 131.

⁵² AMAR, *supra* note 11, at 352–53.

⁵³ AMAR, *supra* note 6, at 467 (discussing the Reconstruction Amendments as a whole).

Consider next the Fifteenth Amendment, which prohibits the “deni[al] or abridge[ment]” of the right to vote “on account of race, color, or previous condition of servitude.”⁵⁴ By 1869—one year before the Amendment’s ratification—nine Northern states provided equal suffrage for Black men, while New York imposed a property requirement.⁵⁵ Moreover, the 1867 Military Reconstruction Act required ten of eleven former Confederate states to guarantee Black suffrage, as an indicator of their fitness to rejoin the Union.⁵⁶ Thus, by the time of the Amendment’s ratification, twenty of thirty-seven states (if one counts New York) allowed Black men to vote.⁵⁷

True, states’ records on suffrage before the Fifteenth Amendment were far from perfect. Only two of eleven referendums for Black suffrage in Northern states were successful between 1865 and 1869, with the two successes occurring in the fall of 1868.⁵⁸ While a majority of states allowed Black votes by 1870, half of them did so only because the federal government had imposed this requirement upon them.⁵⁹ Indeed, part of the Amendment’s impetus was the fear that after rejoining the Union, the states would revoke Black suffrage.⁶⁰

Still, this historical record does not eliminate some states’ pioneering efforts to prohibit racial discrimination in voting. Like the Thirteenth Amendment, the Fifteenth Amendment nationalized the best state practices.⁶¹ And one purpose of a rights-expanding amendment is to

⁵⁴ U.S. CONST. amend. XV, § 1.

⁵⁵ LaWanda & John H. Cox, *Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography*, 33 J. S. HIST. 303, 303 n.1 (1967).

⁵⁶ DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995* 177 (1996). The one former Confederate state exempted from this requirement was Tennessee, which had already rejoined the Union by ratifying the Fourteenth Amendment. See FONER, *supra* note 37, at 95.

⁵⁷ FONER, *supra* note 37, at 108.

⁵⁸ Cox & Cox, *supra* note 55, at 318–19.

⁵⁹ See *supra* text accompanying note 56.

⁶⁰ KYVIG, *supra* note 56, at 177–78. Moreover, even after the Amendment’s passage, it took until the 1960s for Black voting rights to receive legal enforcement across the country. See AMAR, *supra* note 11, at 399.

⁶¹ See *supra* text accompanying note 53.

change the practices in opposing states; if all states protect a right in the first place, an amendment will have little effect.

III. STATES AS PIONEERS OF PROGRESSIVE ERA AMENDMENTS

While states may have had mixed records in promoting the Thirteenth and Fifteenth Amendments, they played a prominent and influential role in Progressive Era amendments. These constitutional revisions include the Seventeenth Amendment, which provided for the direct election of U.S. senators;⁶² the Eighteenth and Twenty-First Amendments, which established and repealed Prohibition, respectively;⁶³ and the Nineteenth Amendment, which granted women the right to vote.⁶⁴

At the outset, it is important to highlight how two of these amendments are different from the rest discussed in this Chapter. By disempowering state legislatures from choosing U.S. senators, the Seventeenth Amendment reduced state governments' influence in Congress and thus had more structural implications than other amendments.⁶⁵ However, it still expanded individual voting rights by taking senatorial-election power from the state legislatures and giving it to “the people.”⁶⁶ The Eighteenth Amendment also contrasts significantly with others in this Chapter. It does not enshrine explicit protections against government interference, as the Bill of Rights does. Nor does it expand rights in the context of historical restrictions, as others from the Reconstruction,

⁶² U.S. CONST. amend. XVII. For an analysis of the broader implications of the Seventeenth Amendment's enactment, see Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventh Amendment*, 49 VAND. L. REV. 1347 (1996).

⁶³ U.S. CONST. amend. XVIII, *repealed by id.* amend. XXI, §1; *id.* amend. XXI. While the Twenty-First Amendment's ratification occurred after the Progressive Era, its role in repealing the Eighteenth makes a discussion of states' roles in its ratification appropriate here.

⁶⁴ *Id.* amend. XIX. For an analysis of the Nineteenth Amendment's implications beyond granting women the right to vote, see Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 66–96 (2015).

⁶⁵ Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song*, 91 NW. U. L. REV. 500, 504–06 (1997) (discussing the Amendment's “structural nature”).

⁶⁶ U.S. CONST. amend. XVII.

Progressive, and modern eras did. Instead, the Amendment contracted rights and infringed upon liberties. In this respect, it is an anomaly not just in this Chapter, but also in the story of national constitutional amendments more broadly. Still, the Amendment and its repeal demonstrate powerfully states' roles in driving national change. I thus proceed to analyze the four amendments specified in the preceding paragraph.⁶⁷

Start with the Seventeenth Amendment. While the original Constitution provided that state legislatures would select U.S. senators,⁶⁸ the Amendment formally established that they would be “elected by the people” instead.⁶⁹ Vikram David Amar has argued that absent the Amendment’s 1913 ratification, “direct election would be with us today in most if not all States.”⁷⁰ Why? Because by 1913, states had already begun pioneering innovative schemes to allow the people to elect senators, despite the state legislatures’ formal selection role.

Consider the following data. In 1910, Sen. Robert L. Owen submitted evidence to the Senate that thirty-four of forty-six states had expressed approval for the direct election of senators, either via resolutions or the actual practice of pseudo-elections.⁷¹ By that same year, twenty-seven states—four shy of the two-thirds required under Article V to call for a constitutional convention⁷²—had petitioned Congress formally for the direct election of senators.⁷³ And according to Ralph A. Rossum, thirty-three states by 1912 had enacted laws providing for direct primary elections.⁷⁴

⁶⁷ See *supra* text accompanying notes 62–64.

⁶⁸ U.S. CONST. art. I, § 3, cl. 1, *amended by id.* amend. XVII, § 1.

⁶⁹ *Id.* amend. XVII, § 1.

⁷⁰ Amar, *supra* note 62, at 1354–55.

⁷¹ 45 CONG. REC. 7113–20 (1910).

⁷² U.S. CONST. amend. V.

⁷³ Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 710 (1999).

⁷⁴ *Id.* at 708.

This state support influenced the Seventeenth Amendment’s adoption significantly. It meant that a majority of senators—two-thirds of whom were needed to send a constitutional amendment to the states for ratification⁷⁵—represented states that supported direct election of senators.⁷⁶ Indeed, ten Republican senators who opposed the Amendment lost their seats in 1910.⁷⁷ Moreover, Rossum argues that the possibility of states successfully calling for a constitutional convention in which amendments beyond the scope of Senate elections would be on the table spurred Congress to heed the states’ calls.⁷⁸ Thus, in a result that “appeared almost a foregone conclusion,”⁷⁹ three-fourths of state legislatures took fewer than eleven months to ratify the Amendment after Congress approved it.⁸⁰

The Eighteenth and Twenty-First Amendments also fit snugly within this Chapter’s narrative of states driving national constitutional amendments. Indeed, the story of Prohibition began nearly seven decades before the Eighteenth Amendment’s 1919 ratification.⁸¹ In 1851, Maine became the first state to enact a statute banning liquor—an example a few additional states soon followed.⁸² However, many of these states soon repealed their prohibition laws,⁸³ and between 1909 and 1913, eight of twelve state referendums rejected statewide alcohol bans—although four additional state legislatures passed prohibition statutes.⁸⁴ Still, twenty-one states had

⁷⁵ U.S. CONST. amend. V.

⁷⁶ Bybee, *supra* note 65, at 537.

⁷⁷ *Id.* at 537–38.

⁷⁸ Rossum, *supra* note 73, at 710–11. *But see* KYVIG, *supra* note 56, at 213 (“A careful scholar of the Article V convention mechanism found no evidence that the threat of a constitutional convention if it did not act itself was crucial in moving Congress.”).

⁷⁹ KYVIG, *supra* note 56, at 213.

⁸⁰ Rossum, *supra* note 73, at 711.

⁸¹ For the Amendment’s ratification date, see Kahlil Chism, *The Constitutional Amendment Process*, 39 SOC. ED. 373, 374 (2005).

⁸² AMAR, *supra* note 11, at 415–16.

⁸³ *Id.* at 416.

⁸⁴ KYVIG, *supra* note 56, at 220.

banned saloons by 1916 and immediately before the Amendment’s ratification, thirty-three (of forty-eight⁸⁵) states were considered “dry” (that is, prohibiting alcohol).⁸⁶

States’ support for Prohibition represents more than an interesting statistic. The thirty-three states’ collective stances arguably influenced Congress to send the Eighteenth Amendment to the states for ratification. David R. Mayhew’s survey of congressional debate over the Amendment demonstrates that Prohibition supporters relied heavily on prodemocracy rhetoric.⁸⁷ In fact, Republican Senator Robert La Follette of Wisconsin voted in favor of sending the Amendment to the states “in support of democracy,” despite correctly predicting that it was unenforceable.⁸⁸ In addition to scrolls and petitions,⁸⁹ state laws were undoubtedly an important indicator of popular support for Prohibition.

But what the states giveth they also taketh away.⁹⁰ States led the way in signaling opposition to the Eighteenth Amendment,⁹¹ culminating in the Twenty-First Amendment’s 1933 ratification.⁹² Rhode Island and Connecticut never ratified the Eighteenth Amendment,⁹³ and Maryland never passed a statute to enforce Prohibition.⁹⁴ In 1923, New York repealed its

⁸⁵ *Id.*

⁸⁶ Chism, *supra* note 81, at 374.

⁸⁷ David R. Mayhew, Commonalities Surrounding Repeal Drives: Prohibition, Right-to-Work, and the Affordable Care Act 12 (April 2024) (unpublished manuscript, on file with author).

⁸⁸ *Id.* at 13 (quoting 55 CONG. REC. 5660 (1917)).

⁸⁹ *Id.* at 12.

⁹⁰ See *Job* 1:21 (King James) (“[T]he LORD gave, and the LORD hath taken away . . .”).

⁹¹ Among the reasons for Prohibition’s failure were the lack of enforcement, rise in organized crime, increase in corruption, and increased need for employment and tax revenue amidst the Great Depression. See AMAR, *supra* note 11, at 417 (raising all four issues); see also KYVIG, *supra* note 56, at 277–79 (discussing various enforcement-related, economic, and cultural reasons for anti-Prohibition sentiment); DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 116 (2d ed. 2000).

⁹² For the 1933 date, see Chism, *supra* note 81, at 374.

⁹³ See STEVEN GOW CALABRESI & GARY LAWSON, THE U.S. CONSTITUTION: CREATION, RECONSTRUCTION, THE PROGRESSIVES, AND THE MODERN ERA 1735 (2020).

⁹⁴ Ron Cassie, *Prohibition in Baltimore and The Colorful Story of Undercover Agent Kitty Costello*, BALTIMORE (Dec. 2023), <https://www.baltimoremagazine.com/section/historypolitics/prohibition-in-baltimore-undercover-agent-kitty-costello/>.

enforcement statute⁹⁵ and its voters delivered a “wet” (that is, anti-Prohibition) victory in a 1926 referendum. That same year, Nevada voters expressed support for repealing the Amendment and Montana repealed its Prohibition-enforcement statute.⁹⁶ Wisconsin repealed its dry statute in 1929 and “wet” referendum victories occurred in Illinois, Massachusetts, and Rhode Island in 1930,⁹⁷ followed by eleven state victories in 1932.⁹⁸ Given this tide of state support for repeal, the requisite three-fourths of states ratified the Twenty-First Amendment in 288 days—the second-fastest process behind the Twelfth Amendment, which required only twelve (as opposed to thirty-six) state ratifications in 1804.⁹⁹

States also played an important role in allowing women to vote via the Nineteenth Amendment. In December 1869, the Wyoming Territory enacted the first U.S. law granting female suffrage.¹⁰⁰ When it became a state twenty years later, its constitution became the first in the world enshrining the right to vote for women.¹⁰¹ True, early advocacy for women’s suffrage in the states produced largely disappointing results. The 480 campaigns for women’s suffrage in thirty-three states between 1870 and 1910 yielded only seventeen referendums, of which two were successful.¹⁰² Thus, in 1912, only nine western states had enshrined full female suffrage.¹⁰³

Yet even when states failed to approve full voting rights for women, female-suffrage advocates were making progress. Some states began permitting women to vote in local elections—

⁹⁵ NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES 70–71 (1931), available at <https://www.ojp.gov/pdffiles1/Digitization/44540NCJRS.pdf>.

⁹⁶ *Id.* at 71.

⁹⁷ *Id.*

⁹⁸ KYVIG, *supra* note 91, at 168.

⁹⁹ KYVIG, *supra* note 56, at 286.

¹⁰⁰ *Today in History - December 10*, LIBR. OF CONG., <https://www.loc.gov/item/today-in-history/december-10/> (last accessed Apr. 3, 2024).

¹⁰¹ *Id.*

¹⁰² KYVIG, *supra* note 56, at 227.

¹⁰³ *Id.*

a nontrivial development.¹⁰⁴ As Akhil Reed Amar writes, “women pioneers were providing by their daily example that equal suffrage was an eminently sensible and thoroughly American way of life suitable for adoption in sister states.”¹⁰⁵ These sister states began slowly following the western states’ examples. Fifteen states granted full women’s suffrage by 1918.¹⁰⁶ By the following year, twelve states allowed women to vote for the President (but not for state and federal legislators), and two additional ones extended suffrage rights for primary elections.¹⁰⁷ Thus, twenty-nine states had enacted full or at least presidential suffrage at the end of 1919.¹⁰⁸

In short, the Seventeenth, Eighteenth, Nineteenth, and Twenty-First Amendments exemplify the power of states to drive national constitutional change. In the case of the Twenty-First, states were powerful enough to produce a repeal of a policy that appeared immensely popular just fourteen years prior. And consistent with the innovative zeitgeist of the Progressive Era, campaigners exploited the newly popular referendum mechanism¹⁰⁹ to express their voices in states across the country.

IV. STATES AS PIONEERS OF MODERN AMENDMENTS

While the Progressive Era stands out for producing four amendments—three of them highly “momentous”—between just 1913 and 1920,¹¹⁰ states’ roles in generating national

¹⁰⁴ AMAR, *supra* note 11, at 421–22.

¹⁰⁵ *Id.* at 422.

¹⁰⁶ *Id.* at 423.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 424. For a list of when each state gave women the right to vote, see CALABRESI & LAWSON, *supra* note 93, at 1736–38. To be clear, factors beyond state support contributed to the Nineteenth Amendment’s ratification. As women’s suffrage became increasingly likely, politicians had political incentives to support the cause, lest they eventually face the ire of female voters. AMAR, *supra* note 11, at 423. Women’s contributions on the home front during World War I and President Woodrow Wilson’s eventual forceful support played an important role as well. *Id.* at 424–25; KYVIG, *supra* note 56, at 234–35. Yet it remains a historical fact that “the Nineteenth Amendment finally became a reality only after a substantial number of states had embraced wom[en’s] suffrage.” AMAR, *supra* note 11, at 421.

¹⁰⁹ JOHN G. MATSUSAKA, LET THE PEOPLE RULE: HOW DIRECT DEMOCRACY CAN MEET THE POPULIST CHALLENGE 70–71 (2020).

¹¹⁰ See Steven G. Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court*, 93 GEO. L.J. 1023, 1028 (2005) (reviewing MARK TUSHNET, REVIEWING THE NEW CONSTITUTIONAL ORDER (2003)).

constitutional amendments did not end there. They played an important role in the enactment of the Twenty-Fourth Amendment’s poll-tax ban for federal elections¹¹¹ and the Twenty-Sixth Amendment’s enshrinement of voting rights for eighteen-year-olds.¹¹²

Consider first the Twenty-Fourth Amendment. While its need arose from states requiring the payment of poll taxes to vote—in an effort to circumvent the Fifteenth Amendment and deny Black suffrage¹¹³—these states were a minority. It appears that around sixteen states imposed some sort of tax-payment requirement for voting after the Fifteenth Amendment’s ratification.¹¹⁴

However, states’ later repudiations of poll taxes presaged the Twenty-Fourth Amendment’s ratification in 1964.¹¹⁵ For the 1936 presidential election, nine states imposed poll taxes.¹¹⁶ While the taxes dramatically reduced adult-citizen voting in those states,¹¹⁷ the number of states was at least seven fewer than the poll tax’s peak. By the time of the Amendment’s 1962 passage in Congress, only five states—Alabama, Arkansas, Mississippi, Texas, and Virginia—still had poll

¹¹¹ U.S. CONST. amend. XXIV, § 1.

¹¹² *Id.* amend. XXVI, § 1.

¹¹³ FONER, *supra* note 37, at 109. Note that poll taxes—also known as capitation taxes—have a long history in the United States. *See generally* Brian Sawers, *The Poll Tax Before Jim Crow*, 57 AM. J. LEGAL HIST. 166 (2017). The issue the Amendment addresses is not a capitation tax per se, but rather the conditioning of voting rights on such a tax. *See* U.S. CONST. amend. XXVI, § 1 (“The right of citizens of the United States to vote [in federal elections] shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.”). Hereafter, my usage of the term “poll tax” refers to taxes treated as prerequisites for voting.

¹¹⁴ *See, e.g.*, UNITED STATES GOVERNMENT PRINTING OFFICE, HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON RULES AND ADMINISTRATION: UNITED STATES SENATE: EIGHTIETH CONGRESS: FIRST SESSION ON S. RES. 25, 30, 32, AND 39 117 (1947) (statement of Sen. Holland) (listing Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia); Kelly Phillips Erb, *For Election Day, A History of the Poll Tax in America*, FORBES (Nov. 5, 2018, 08:30 PM), <https://www.forbes.com/sites/kellyphillipserb/2018/11/05/just-before-the-elections-a-history-of-the-poll-tax-in-america/?sh=429c08064e44> (same); Frank B. Williams, Jr., *The Poll Tax as a Suffrage Requirement in the South, 1870–1901*, 18 J. S. HIST. 469, 470–71 (including the same eleven states but adding Oregon as a state that required school-tax payment for voting); *id.* at 470 n.5 (“From 1865 to 1890 Pennsylvania, Delaware, Massachusetts, and Rhode Island required the payment of this or some other tax as a condition for voting.”). I have not found a source purporting to list all the states that imposed poll taxes, hence my uncertainty on the exact number.

¹¹⁵ For the 1964 date, see AMAR, *supra* note 11, at 442.

¹¹⁶ *Disenfranchisement by Means of the Poll Tax*, 53 HARV. L. REV. 645, 645 n.1 (1940).

¹¹⁷ *Id.*

taxes.¹¹⁸ Thus, the Amendment represented a collective action by a supermajority of states to reject a rights-infringing practice in a small set of outlier ones.

States also played a sizable role in delivering voting rights to eighteen-to-twenty-year-olds. Even before college-aged citizens put eighteen-year-olds' right to vote on the map in the late 1960s,¹¹⁹ four gave voting rights to some segment of the below-twenty-one population: Georgia (1943), Kentucky (1955), Alaska (1956),¹²⁰ and Hawaii (1959).¹²¹ However, myriad state referendum efforts to lower the voting age between 1950 and 1970 failed.¹²² But by December 1970, five additional states lowered the voting age below twenty-one and Alaska reduced it from nineteen to eighteen.¹²³

As a historical matter, factors other than states undoubtedly played greater roles in the Twenty-Sixth Amendment's ratification. The drafting of eighteen-year-olds to serve in the Vietnam War and growing discontent over the War convinced even its champions to support lowering the voting age.¹²⁴ Thus, President Richard Nixon approved setting the voting age at eighteen in signing the 1970 Voting Rights Act, despite believing that such a federal mandate was unconstitutional.¹²⁵ The Act's signing catalyzed the Amendment's 1971 ratification, albeit in a circuitous fashion.¹²⁶ Later in 1970, a divided U.S. Supreme Court in *Oregon v. Mitchell* held that Congress could

¹¹⁸ Deborah N. Archer & Derek T. Muller, *The Twenty-Fourth Amendment: Common Interpretation*, NAT'L CONST. CNTR., <https://constitutioncenter.org/the-constitution/amendments/amendment-xxiv/interpretations/157> (last accessed Apr. 17, 2024).

¹¹⁹ KYVIG, *supra* note 56, at 363–64.

¹²⁰ Notably, Alaska's expansion of suffrage came before its 1959 admission to the Union. See John S. Hellenthal, *Alaska's Heralded Constitution: The Forty-Ninth State Sets an Example*, 44 A.B.A. J. 1147, 1147, 1149 (1958).

¹²¹ KYVIG, *supra* note 56, at 364.

¹²² *Id.* at 364–65.

¹²³ *Id.* at 365; *Oregon v. Mitchell*, 400 U.S. 112, 213 n.90 (1970) (Harlan, J., concurring in part and dissenting in part)

¹²⁴ AMAR, *supra* note 11, at 446–47; KYVIG, *supra* note 56, at 363–64.

¹²⁵ KYVIG, *supra* note 56, at 366.

¹²⁶ *Id.* at 366–67.

enshrine the lower voting age for federal but not state elections.¹²⁷ Impelled by the concerning prospect of different voter-eligibility rules for federal and state elections in 1972, Congress and the states acted swiftly to pass and ratify the Amendment in 1971.¹²⁸

Nevertheless, states' roles in the Twenty-Sixth Amendment should not be ignored. Georgia and Kentucky led the way in demonstrating for the nation the viability of eighteen-year-olds voting,¹²⁹ twenty-eight and sixteen years, respectively, before the nation came around to their wisdom. While the federal government's legislative and judicial actions spurred the Amendment's ratification, the 1970 referendum results demonstrate that the nation was trending in the direction of the Amendment's expansion of voting rights.¹³⁰ Although the national government took the lead, a few forward-thinking states had planted the seed.

V. LOOKING TO THE FUTURE: DERIVING NEW CONSTITUTIONAL AMENDMENTS FROM EXISTING STATE PROVISIONS

Given states' important roles in inspiring and informing the Bill of Rights and Progressive Era and modern amendments, existing state practices are especially appropriate sources to consult if one wishes to predict future successful amendments. Amar writes that proposed amendments "will be taken seriously if comparable proposals have already been adopted and road-tested at the state level."¹³¹ Additionally, Stephen Sachs has advocated for a bottom-up approach towards

¹²⁷ 400 U.S. 112 (1970). Four justices found in favor of congressional regulation of voting age in all elections, four found against federal regulation in any election, and Justice Hugo Black split the difference, leading to the case's result. KYVIG, *supra* note 56, at 366–67.

¹²⁸ KYVIG, *supra* note 56, at 367–68.

¹²⁹ For the importance of setting such an example in the Nineteenth Amendment's context, see *supra* text accompanying note 105.

¹³⁰ *But see id.* at 363 (arguing that the Amendment's "adoption took place despite clear evidence of considerable public opposition").

¹³¹ AMAR, *supra* note 6, at 467.

amending the Constitution by empowering states, as opposed to Congress, to initiate the amendment process.¹³²

While the constitutional amendments discussed above focus more on rights than structural changes, amendments have addressed structural issues like the Electoral College¹³³ and presidential succession and disabilities¹³⁴ as well. Below, I discuss and analyze three potential future amendments based on existing practices in wide swathes of states: judicial term limits, popular-vote-based elections of executives, and constitutional-amendment processes. Although these amendments may appear more structural, their adoption would also expand rights in some ways. Judicial term limits implicate criminal-procedure and due-process protections in affecting who decides litigants' cases. Abolishing the Electoral College would, from proponents' perspective, give citizens' votes equal weight in presidential elections regardless of their home state's population. And the ease of amending the Constitution implicates directly "the Right of the People to alter or to abolish" our form of government.¹³⁵

First, consider the length of judicial service. Under Article III of the U.S. Constitution, federal judges have lifetime tenure "during good behaviour."¹³⁶ The lack of term limits for judges at the federal level departs from state practices; only one state, Rhode Island, guarantees life tenure for the judges of its highest court.¹³⁷ Thus, the collective wisdom of the American people—as expressed through the states—may suggest that life tenure at the federal level should be

¹³² Christina Pazzanese, *Amendments Should Start with States*, HARV. GAZETTE (Dec. 5, 2022), <https://news.harvard.edu/gazette/story/2022/12/amendments-should-start-with-states-stephen-sachs/>.

¹³³ U.S. CONST. amend. XII.

¹³⁴ *Id.* amend. XXV.

¹³⁵ THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776).

¹³⁶ *Id.* art. III, § 1.

¹³⁷ Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 821 (2005).

amended.¹³⁸ On the other hand, perhaps judicial independence is important at the federal level in particular¹³⁹—especially given the role that the Fourteenth Amendment’s drafters and ratifiers envisaged for federal courts to safeguard civil rights in the absence of state protection.¹⁴⁰ The divergence in judicial tenure between the federal and state governments may therefore be appropriate. The existence of such a divergence, however, beckons careful consideration of whether existing judicial systems get judicial term lengths right.¹⁴¹

Second, the federal and state governments diverge on means of electing executives. While the President is elected by the Electoral College,¹⁴² no state selects its governors by such a mechanism.¹⁴³ Since polls indicate support for abolishing the College—especially amongst Democrats—this federal/state divergence also merits attention.¹⁴⁴ Again, however, there may be unique considerations pertaining to a national executive versus a state one. For example, the current presidential-selection process may encourage candidates to campaign before a wider set of voters than under a popular-vote system; limit voter fraud by diversifying election administration across fifty states and Washington, D.C.; and promote federalism.¹⁴⁵

¹³⁸ Note also that arguments against life tenure are not new. Some Anti-Federalists opposed the Constitution in part because they felt that Article III provided federal judges with too much independence. *See, e.g., Brutus, Essay XV* (Mar. 20, 1788), in *THE ANTI-FEDERALIST: AN ABRIDGEMENT, BY MURRAY DRY, OF THE COMPLETE ANTI-FEDERALIST 182* (Herbert J. Storing ed. 1985).

¹³⁹ *See* AMAR, *supra* note 6, at 472–73 (discussing independence in the context of judicial tenure).

¹⁴⁰ *Id.* at 109; William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 *STAN. L. REV.* (forthcoming 2024) (manuscript at 21–22), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4604902 (discussing the Amendment’s “forum-shifting design”).

¹⁴¹ AMAR, *supra* note 6, at 468.

¹⁴² U.S. CONST. amend. XII.

¹⁴³ AMAR, *supra* note 6, at 471.

¹⁴⁴ Megan Brenan, *61% of Americans Support Abolishing the Electoral College*, GALLUP (Sept. 24, 2020), <https://news.gallup.com/poll/320744/americans-support-abolishing-electoral-college.aspx>.

¹⁴⁵ Allen Guelzo, *In Defense of the Electoral College*, NAT’L AFFAIRS (Winter 2018), <https://www.nationalaffairs.com/publications/detail/in-defense-of-the-electoral-college>.

Third, every state constitution is easier to amend than the federal one.¹⁴⁶ Every state except Delaware allows for a popular vote to amend its constitution, and forty-six states have a fifty-one-percent threshold for amendments.¹⁴⁷ Indeed, opposition to Article V’s arduous process for amending the Constitution traces back to the ratification debates. The Anti-Federalist An Old Whig, for example, lamented that the Constitution “never can be altered or amended without some violent convulsion or civil war.”¹⁴⁸ Some scholars have even suggested that the Constitution can be amended outside of the Article V procedure.¹⁴⁹

However, there are also merits to having more stringent standards for national amendments. From a risk-management perspective, injudicious national constitutional amendments have a wider sweep than unwise state constitutional amendments. Allowing states to test out constitutional amendments first via their lower amending thresholds will better ensure that nationally imposed ones truly reflect the careful consideration of the American people as a whole.¹⁵⁰ And as Parts I–IV demonstrate, national amendments have historically arisen from state counterparts.

There undoubtedly exist more issues where federal-versus-state comparisons reveal intriguing insights.¹⁵¹ Yet the issues of judicial tenure, executive selection, and amendment process discussed above are not only salient ones in modern political discourse, but also highlight key considerations regarding the propriety of translating state practices to the national level.

¹⁴⁶ Jeffrey S. Sutton, *What Should Be National and What Should Be Local in American Judicial Review*, 2022 SUP. CT. REV. 191, 194.

¹⁴⁷ *Id.*

¹⁴⁸ An Old Whig I (August 18, 1789), CONSOURCE, <https://www.consource.org/document/an-old-whig-i-1789-8-18/> (last accessed Apr. 4, 2024).

¹⁴⁹ See, e.g., Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994).

¹⁵⁰ AMAR, *supra* note 6, at 469.

¹⁵¹ See *id.* at 468–73.

CONCLUSION

Article V represents a key provision empowering states to drive national constitutional change via amendments. Not only does the text explicitly provide states with ratification power, but the history of successful constitutional amendments demonstrates that state laws and constitutions have often formed the basis of such amendments. Notably, the role of states has persisted throughout American history, extending from the Bill of Rights to the twentieth century. Thus, reformers seeking amendments to the Constitution would be wise to pay attention to existing state practices.

Given that this Chapter serves my broader aim of demonstrating why states matter on a national level, it does not endeavor to analyze comprehensively the state roots of every constitutional amendment. As a brief counterexample to this Chapter's overall thesis, states appeared to follow the national government in imposing term limits on their executives, as opposed to the other way around.¹⁵² Although this Amendment (the Twenty-Second) appears more structural, perhaps one could view it as affecting citizens' rights to vote for new presidential candidates who have not served for two terms (and thus also lack an incumbency advantage).¹⁵³ Indeed, the Amendment and those discussed in Part V highlight how even structure-focused amendments may raise questions about individual rights. Future research may seek to explore further the rights dimensions of seemingly structural amendments, as well as whether state rights may be better suited toward national adoption than state structures.¹⁵⁴ Still another open question arises from this Chapter, albeit an interpretive one: given that some federal constitutional

¹⁵² AMAR, *supra* note 11, at 436 n.*.

¹⁵³ I thank David R. Mayhew for this point.

¹⁵⁴ For one admonition against nationalizing too many rights, see generally Sutton, *supra* note 146. Note also that some amendments do not naturally lend themselves to a state-focused analysis. The Twenty-Third Amendment, for example, dealt with the unique constitutional nature of Washington, D.C. by giving it Electoral College votes. U.S. CONST. amend. XXIII, § 1.

provisions mirrored the texts of state constitutional provisions,¹⁵⁵ to what extent should originalists look at original understandings of state clauses to determine the meaning of federal clauses?¹⁵⁶

While these questions are fruitful ground for further scholarship, this Chapter has shown how states' formal powers under the Constitution give them national influence. I turn now to a more informal means of state influence.

¹⁵⁵ See, e.g., AMAR, *supra* note 2, at 241–44 (analyzing state constitutional provisions and court decisions relating to searches and seizures to formulate an interpretation of the U.S. Constitution's Fourth Amendment).

¹⁵⁶ Jason Mazzone and Cem Tecimer have called this type of analysis “interconstitutionalism.” Jason Mazzone & Cem Tecimer, *Interconstitutionalism*, 132 YALE L.J. 326 (2022).

CHAPTER TWO: MAKING STATES COUNT: COUNTING STATE PRACTICES TO DETERMINE NATIONAL CONSTITUTIONAL RIGHTS*

INTRODUCTION

While thirty-eight states must ratify a constitutional amendment for it to take effect, amendments are not the only means for states to have national influence collectively. This Chapter focuses on a less formal method for states to affect the United States Constitution's national application: the U.S. Supreme Court's counting of state practices to identify federal constitutional rights. Part I highlights several examples of the Court's use of state counting, emphasizing different uses of the method. Part II outlines the theoretical bases for this approach, while Section III.A. analyzes scholarly discussions of the method.

Extracting the most persuasive elements of existing scholarship, I propose a novel framework for determining whether a sufficient number of states have recognized a right for it to merit national protection in Section III.B. Specifically, I suggest an Article V Rule and a Section 5 Rule. The Rules provide state-counting formulae that reflect sufficient support for a right's protection via a constitutional amendment and congressional enforcement of the Fourteenth Amendment, respectively. Either Rule's satisfaction would be sufficient for federal courts to recognize new, unenumerated rights as meriting national constitutional safeguarding.

After responding to potential questions about my Rules in Section III.C, I show in Part IV how the Rules may apply to rights the Court has not yet recognized such as the right to education. The Conclusion then highlights areas for future political-science research relating to state counting.

This Chapter provides this Essay's most significant contribution to existing scholarship. The Court and legal scholars have failed to provide state-counting rules that are specific enough

* An early version of this Chapter was presented at the 2023 Graduate Immersion Conference, hosted by the Department of Political Science at The Ohio State University. I am grateful for the feedback of conference participants, especially my discussant, Gregory A. Caldeira.

to constrain judges from making policy judgments, and broad enough to reflect fully the Constitution’s mechanisms for recognizing unenumerated rights. I provide bright-line, easily administrable Rules giving effect to both Article V and Section 5 of the Fourteenth Amendment that jurists can use in future state-counting analyses. In doing so, I demonstrate how courts have historically interpreted—and can in the future interpret—the Constitution to give states the power to deliver national constitutional change.

I. EXAMPLES OF STATE COUNTING IN SUPREME COURT JURISPRUDENCE

For decades, the Supreme Court has counted state practices to determine whether certain rights deserve constitutional protection. Yet the Court has employed this methodology in several forms. The evolution of the Court’s exclusionary-rule jurisprudence tracked changes in states’ views on the wisdom of this rule, as has its broader jurisprudence regarding the incorporation of federal constitutional rights. Sometimes, the Court’s state-counting analysis results in the upholding of a state law, as in the case of Washington’s ban on physician-assisted suicide.¹ At other times, the Court’s analysis leads it to strike down state statutes infringing upon individual liberties, like Texas’s anti-sodomy laws.² This Part seeks to provide illustrative examples of how the Court has wielded state counting, setting the stage for a theoretical analysis of the methodology in Parts II and III.

A. THE EXCLUSIONARY RULE

As Chief Judge Jeffrey S. Sutton has noted, the exclusionary rule provides an insightful lens into the dialogue between state and federal courts.³ For background, this rule “generally prohibits the introduction at criminal trial of evidence obtained in violation of a defendant’s Fourth

¹ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

² *Lawrence v. Texas*, 539 U.S. 558 (2003).

³ *See generally* JEFFREY S. SUTTON, 51 *IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW* 42–83 (2018).

Amendment rights.”⁴ Two primary rationales exist for this rule: judicial integrity and deterrence. Early on in the exclusionary rule’s development, the Court focused on the idea that courts should not countenance police officers’ unconstitutional behavior by admitting evidence obtained unlawfully.⁵ As explained in *Weeks v. United States* (1914), “The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts.”⁶ However, the Court eventually grounded the exclusionary rule’s requirement in the idea of deterrence.⁷ Thus, fifty-one years later in *Linkletter v. Walker*, it summarized its jurisprudence by noting that “the exclusion of illegal evidence [has] been based on the necessity for an effective deterrent to illegal police action.”⁸

Given the Court’s evolving rationales for the exclusionary rule, it should come as no surprise that the scope of its application took a meandering journey through the judicial system. In 1920, the Court heard a case (*Silverthorne Lumber Co., Inc. v. United States*) involving federal officers who violated the Fourth Amendment in seizing a company’s business records, copied them before returning the originals, and used the copies to issue a subpoena.⁹ As Sutton notes, the Court in *Silverthorne* introduced two groundbreaking principles: first, unlawfully obtained evidence should be suppressed on the grounds of deterring police misconduct; and second, the Fourth

⁴ *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 359 (1998). The full text of the Fourth Amendment reads as follows: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

⁵ Robert M. Bloom & David H. Fentin, *A More Majestic Conception: The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 47–48 (2010). See also *Elkins v. United States*, 364 U.S. 206, 222 (1960) (citing the idea of “judicial integrity” to forbid the introduction of evidence obtained by federal law-enforcement officers from state officers who violated the Fourth Amendment).

⁶ 232 U.S. 383, 392 (1914).

⁷ SUTTON, *supra* note 3, at 70–71 (citing *Linkletter v. Walker*, 381 U.S. 618 (1965)).

⁸ 381 U.S. at 636–37 (citations omitted).

⁹ 251 U.S. 385 (1920).

Amendment's ostensible requirement of the exclusionary rule encompasses "any advantages that the Government can gain over the object of its pursuit by doing the forbidden act."¹⁰

Together with *Weeks v. United States*,¹¹ *Silverthorne* established a constitutional requirement for the exclusionary rule in federal court.¹² However, the Court did not require this rule in state courts initially and in 1949, declined to do so in *Wolf v. Colorado*.¹³ Here is where state counting comes into play. The Court conducted a thorough analysis of the exclusionary rule's adoption in states before the 1914 *Weeks* decision and in the thirty-five years since. Before *Weeks*, twenty-seven states had considered such a rule and all but one had rejected it. Of the twenty-six states that reconsidered their pre-*Weeks* jurisprudence on the rule after *Weeks*, ten newly applied it and sixteen continued to reject it. As for the twenty states that first considered the rule only after *Weeks*, fourteen rejected it and six applied it in state court. In total, thirty-one states had rejected the rule and sixteen agreed with it at the time of the *Wolf* decision.¹⁴

The states' rejection of the exclusionary rule was significant to the Court. It refused to "brush aside the experience of States which deem the incidence of such [unconstitutional] conduct by the police too slight to call for a deterrent remedy" via the exclusionary rule.¹⁵ The Court also paid special attention to states' responses to *Weeks*: "contrariety of views of the States is particularly impressive in view of the careful reconsideration which they have given the problem

¹⁰ SUTTON, *supra* note 3, at 70–71 (quoting *Silverthorne*, 251 U.S. at 391).

¹¹ 232 U.S. 383 (1914).

¹² According to Sutton, the Court misinterpreted *Weeks* as standing for the proposition "that use of the seized evidence involved 'a denial of the constitutional rights of the accused.'" *Mapp v. Ohio*, 367 U.S. 643 (1961) (quoting *Weeks*, 232 U.S. at 398). Instead, he argues that "*Weeks* establishes an individual's constitutional right to the return of illegally seized property, not necessarily a constitutional right to exclude it at a subsequent criminal trial . . ." Nevertheless, what matters here is the treatment of some combination of *Weeks* and *Silverthorne* as requiring a federal exclusionary rule. SUTTON, *supra* note 3, at 55–58.

¹³ 338 U.S. 25 (1949).

¹⁴ *Id.* at 29.

¹⁵ *Id.* at 31–32.

in the light of the *Weeks* decision.”¹⁶ In short, the Court assessed whether the Constitution required incorporating the federal exclusionary rule to the states by looking at existing state practices and states’ responses to Court decisions. Because states had rejected the exclusionary rule before and after *Weeks*, the Court did not foist it upon the states—at least not yet.

By 1961, the state of play had changed. And so did the Court’s view of the exclusionary rule. In *Mapp v. Ohio*, the Court extended the exclusionary rule by requiring states to follow it as well. Once again, state practices influenced its decision heavily. Recognizing that it was overturning *Wolf*, the Court noted that “[w]hile, in 1949, prior to the *Wolf* case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the [exclusionary] rule.”¹⁷ The exact state practices the Court considered here are unclear. Its verbiage suggests that it focused solely on the states that reevaluated the exclusionary rule after *Wolf*, although Sutton interprets *Mapp* as highlighting how more than half of the states had adopted some sort of exclusionary rule by 1961.¹⁸ The Court was persuaded particularly by the California Supreme Court’s post-*Wolf* reversal in adopting the exclusionary rule, after finding that “other remedies have completely failed to secure compliance with the constitutional provisions”¹⁹

In short, the Court’s exclusionary-rule jurisprudence provides a clear example of state practices in the aggregate directly influencing national constitutional rights. Because states had

¹⁶ *Id.* at 29.

¹⁷ *Mapp*, 367 U.S. at 651 (citing *Elkins*, 364 U.S. at 224–32).

¹⁸ SUTTON, *supra* note 3, at 61. While I do not agree completely with Sutton’s interpretation, the Court in *Mapp* did cite an appendix from *Elkins* that surveyed all fifty states’ practices and concluded that twenty-six states had adopted some form of an exclusionary rule and twenty-four had not. *Mapp*, 367 U.S. at 651 (citing *Elkins*, 364 U.S. at 224–32). Regardless, Sutton’s broader point about state practices informing the Court’s shift between *Wolf* and *Mapp* stands.

¹⁹ *Mapp*, 367 U.S. at 651 (quoting *People v. Cahan*, 44 Cal. 2d 434, 445 (1955)).

rejected the rule prior to *Wolf*, the Court abstained from foisting it upon them. However, when a majority of states came around to the Court's view of the exclusionary rule's wisdom, it incorporated the rule as a requirement in both state and federal courts. Note also the way the Court treated state practices. It is not uncommon for the Court to cite and evaluate the legal reasoning of state courts, as it did in *Mapp* by quoting the California Supreme Court. Yet the Court did not value states only for the argumentation of their judges. Rather, it placed significant weight purely on the number of states that had adopted the exclusionary rule—regardless of their rationales. In other words, the Court relied heavily on the objective, empirical methodology of counting state practices, separate from its own judgments about what the Fourth Amendment requires and the wisdom of the exclusionary rule.

B. INCORPORATION

While subsequent Court cases involving state counting require less exposition, they are just as significant. Indeed, the exclusionary rule provides a launching point for further discussion about state counting, starting with the idea of incorporation. Because the Bill of Rights applied originally to the federal government and not state governments,²⁰ the first eight amendments to the Constitution apply to the states through incorporation via the Fourteenth Amendment.²¹ At its core, *Mapp* is an incorporation case since the Court believed the exclusionary rule was a requirement under the Fourth Amendment and thus incorporated it to benefit criminal defendants in state courts. Yet state counting appears more broadly in the Court's consideration of whether to incorporate constitutional provisions.

²⁰ *Barron v. Mayor & City Council of Baltimore*, 32 U.S. 243 (1833).

²¹ For a comprehensive account of scholarship regarding incorporation, see AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* xi–xv, 137–294 (1998) (proposing a model of “refined incorporation”).

While *Wolf* declined to require state exclusionary rules, it also considered whether to incorporate the Fourth Amendment. By the time of *Wolf*, all state constitutions featured Fourth Amendment-like provisions prohibiting unreasonable searches and seizures—a fact Sutton finds significant,²² although the *Wolf* Court did not mention it to justify the Amendment’s incorporation. Indeed, Sutton sees strong similarities between *Wolf* and the 2010 case *McDonald v. Chicago*,²³ which incorporated the Second Amendment’s “right of the people to keep and bear Arms.”²⁴ According to a 2006 analysis by Eugene Volokh, forty-four states have constitutional guarantees of the right to bear arms.²⁵ Although Justice Samuel Alito’s opinion for the Court did not cite this figure,²⁶ it did include a state-counting analysis at the time of the Fourteenth Amendment’s adoption in 1868. Specifically, the opinion noted that twenty-two of thirty-seven state constitutions at the time had “provisions explicitly protecting the right to keep and bear arms.”²⁷ Thus, “[a] clear majority of the States in 1868 . . . recognized the right to keep and bear arms as being among the foundational rights necessary to our system of government.”²⁸

In 2019, the Court once again found state requirements significant in an incorporation case—this time concerning the Eighth Amendment’s prohibition on excessive fines.²⁹ Notably, Justice Neil Gorsuch’s opinion for the Court in *Timbs v. Indiana* analyzed state practices in both 1868 and 2019. In 1868, thirty-five of thirty-seven state constitutions prohibited excessive fines,

²² SUTTON, *supra* note 3, at 58.

²³ 561 U.S. 742 (2010).

²⁴ U.S. CONST. amend. II.

²⁵ See generally Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006).

²⁶ Interestingly, Justices John Paul Stevens and Stephen Breyer both cited this statistic in their dissents. *McDonald*, 561 U.S. at 870 n.13 (Stevens, J., dissenting); *id.* at 938 (Breyer, J., dissenting).

²⁷ *Id.* at 777 (citing Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 50 (2008)).

²⁸ *Id.* (citations omitted).

²⁹ U.S. CONST. amend. VIII. The full text reads: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

accounting for over 90% of the country’s population,³⁰ while all fifty states by 2019 either had such a prohibition or a proportionality requirement.³¹

Thus, the Court has relied repeatedly on state practices to determine whether portions of the Bill of Rights should be incorporated. Sometimes, an implicit correlation between current state practices and the Court’s ruling exists, while at other times, the Court has counted current state practices or those in 1868 explicitly.

C. IDENTIFYING UNENUMERATED RIGHTS

State counting also has relevance when it comes to unenumerated rights—those not mentioned explicitly in the Constitution but rather inferred from it.³² Below, I address three unenumerated-rights cases in which the Court employed a state-counting methodology.

One of the first examples of the state-counting methodology’s application to unenumerated rights comes from the 1965 case *Griswold v. Connecticut*.³³ Here, the Court rejected a Connecticut law prohibiting the use of contraceptives, and more broadly declared a constitutional right to privacy.³⁴ In a (nonbinding) concurrence, Justice John Marshall Harlan II based his support for the Court’s result on his dissent in a previous case concerning the same law: “But conclusive, in my view, is the utter novelty of this enactment. Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of

³⁰ 139 S. Ct. 682, 688 (citing Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?* 87 TEX. L. REV. 7, 82 (2008)).

³¹ *Id.* at 689 (citation omitted).

³² For an overview and justification of state counting to determine unenumerated rights, see AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 117–24 (2012).

³³ 381 U.S. 479 (1965).

³⁴ *Id.* at 484–86.

contraceptives, none, so far as I can find, has made the use of contraceptives a crime.”³⁵ In other words, that forty-nine states protected the right to use contraceptives was key in Harlan’s view.

In *Washington v. Glucksberg* (1997), a majority of the Court adopted a state-counting approach in evaluating the constitutionality of a Washington state statute that prohibited assisting in suicides. The case revolved around whether the state’s ban violated the Due Process Clause of the Fourteenth Amendment,³⁶ which the Court held protects “those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition’ . . . and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”³⁷ As part of its examination of “our Nation’s history, legal traditions, and practices,” the Court in *Glucksberg* found it significant that forty-four states, Washington, D.C., and two territories opposed assisted suicides: “In almost every State . . . it is a crime to assist a suicide. The States’ assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States’ commitment to the protection and preservation of all human life.”³⁸ Notably, the Court discussed state practices before surveying over seven centuries of practice in England and the United States, underscoring the centrality of the state-counting analysis to its decision.³⁹

³⁵ *Poe v. Ullman*, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting). “In *Griswold*, Justice Harlan in effect incorporated by reference his *Poe* opinion.” AMAR, *supra* note 32, at 540 n.29 (citing *Griswold*, 318 U.S. at 500 (Harlan, J., concurring in the judgment)).

³⁶ U.S. CONST. amend. XIV, § 1, cl. 3. (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”). Numerous legal scholars have argued that unenumerated rights do not derive from the Due Process Clause, but rather from the Privileges or Immunities Clause of the Fourteenth Amendment. *Id.* amend. XIV, § 1, cl. 3 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”). While I agree that the latter clause is the appropriate one for both incorporation and unenumerated rights, the Court recently noted that its “history and tradition” test would apply regardless of which clause was under consideration. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2248 n.22 (2022). For an argument against using the Due Process Clause and not the Privileges or Immunities Clause, see AMAR, *supra* note 32, at 118–21. For a summary of the Court’s usage of the Due Process Clause instead of the Privileges or Immunities Clause, see DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* 73–83 (2007).

³⁷ *Glucksberg*, 521 U.S. at 720–21 (quoting *Moore v. East Cleveland*, 431 U. S. 494, 503 (1977) (plurality opinion); *Palko v. Connecticut*, 302 U. S. 319, 325, 326 (1937)).

³⁸ *Id.* at 710 (citations omitted).

³⁹ *Id.* at 710–19.

While in *Griswold* state counting appeared only in a concurrence and the Court used it in *Glucksberg* to uphold a state restriction on liberty, the Court in *Lawrence v. Texas* counted state practices to uphold individual rights against governmental intrusion—this time in the form of state anti-sodomy laws.⁴⁰ Specifically, the Court noted that only thirteen states at the time of its 2003 decision had statutes proscribing sodomy; four of the states enforced those laws against only homosexual individuals; and in the thirteen states, “there is a pattern of nonenforcement with respect to consenting adults acting in private.” In contrast, all fifty states had anti-sodomy laws before 1961, and twenty-four had such laws when the Court upheld them in 1986.⁴¹

Finally, in 2022, Justice Brett Kavanaugh in *New York State Rifle & Pistol Association, Inc. v. Bruen* employed a state-counting analysis in his concurrence to explain his support for the Court’s opposition to New York’s gun-licensing regulations and to highlight the limits of the majority opinion. He emphasized that only six states employed a “may-issue” regime like New York’s that grants “unusual discretion[.]” to state officials.⁴² In contrast, forty-three states have “shall-issue” schemes that do not grant such autonomy. Kavanaugh thus stressed that the Court’s ruling would affect a small number of states.⁴³

In sum, the last six decades demonstrate how state practices have been critical to the Court’s assessment of unenumerated rights. Moreover, majority, concurring, and dissenting opinions have all employed a state-counting methodology, and the Court has used this technique to uphold and strike down state laws.

⁴⁰ *Lawrence*, 539 U.S. 558.

⁴¹ *Id.* at 572-73. For the 1986 case, see *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁴² Specifically, New York “issue[d] public-carry licenses only when an applicant demonstrates a special need for self-defense.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2122 (2022).

⁴³ *Id.* at 2161 (Kavanaugh, J., concurring). One might question the inclusion of *Bruen* in the unenumerated-rights Section of this Chapter, given that the Second Amendment protects “the right of the people to keep and bear Arms.” U.S. CONST. amend. II. However, since *Bruen* dealt specifically with a licensing regime—an issue the Amendment does not comment on explicitly—and the Amendment had already been incorporated, the case fits within this Section.

II. THEORETICAL BASES FOR COUNTING STATE PRACTICES

Given that the Court has counted state practices in varied contexts for decades, it is worth addressing the theoretical bases for this methodology. After all, just because the Court says and does something does not guarantee its actions' propriety. *Washington v. Glucksberg* provides one rationale for state counting—that an inquiry into unenumerated rights should focus on “our Nation’s history, legal traditions, and practices,” which state actions can reveal.⁴⁴ However, a more comprehensive analysis of this methodology’s foundations demonstrates several additional bases for its usage.

Perhaps the strongest source of the state-counting methodology’s legitimacy is Article V’s requirement that the ratification of three-fourths of states (thirty-eight today) is required for the adoption of a constitutional amendment.⁴⁵ The Article stands for the broader proposition that there is constitutional significance to a right or practice that three-fourths of states agree on.⁴⁶ On the flip side, as Steven G. Calabresi and Sarah E. Agudo note, “[a]rguably, rights protected by less than three-quarters of the states in 1868 were not believed to be fundamental and are not deeply rooted in history and tradition.”⁴⁷

In a separate article, Calabresi, Agudo, and coauthors highlight the Fourteenth Amendment’s guarantee that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens . . . of the State wherein they reside.”⁴⁸ Thus, they conclude

⁴⁴ 521 U.S. 702, 710 (1997).

⁴⁵ U.S. CONST. art. V. State ratification is necessary but not sufficient. Amendments must also receive the support of two-thirds of the House of Representatives and U.S. Senate, or two-thirds of states may apply for Congress to call a convention to propose amendments (that states would subsequently have to ratify for them to take effect).

⁴⁶ Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 444.

⁴⁷ Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 16 (2008).

⁴⁸ U.S. CONST. amend. XIV, § 1, cl. 1.

“that the state constitutional law fundamental rights of all Americans are equally protected by the Privileges or Immunities Clause of the Federal Fourteenth Amendment.”⁴⁹ This interpretation of the Clause aligns well with the Privileges *and* Immunities Clause of Article IV, which states that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”⁵⁰

Scholars have documented comprehensively how the Framers of the Fourteenth Amendment were influenced by Justice Bushrod Washington’s 1823 opinion on the Article IV Clause while riding circuit in *Corfield v. Coryell*.⁵¹ Washington’s opinion notes that one of several defining characteristics of citizens’ privileges and immunities is that they “have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.”⁵² Thus, *Corfield* embraces looking at rights granted by state governments to assess citizens’ privileges and immunities.⁵³

Additionally, Akhil Reed Amar has based his support for the state-counting methodology on a synthesis of the Ninth and Fourteenth Amendments. The Ninth Amendment provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁵⁴ Under this Amendment, Amar asserts that the People have a “right to discover and embrace new rights and to have these new rights respected by government, so long

⁴⁹ Steven G. Calabresi, James Lindgren, Hannah M. Begley, Kathryn L. Dore & Sarah E. Agudo, *Individual Rights Under State Constitutions in 2018: What Rights are Deeply Rooted in a Modern-Day Consensus of the States?*, 94 NOTRE DAME L. REV. 49, 153 (2018).

⁵⁰ U.S. CONST. art. IV, § 2, cl. 1.

⁵¹ *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3,230) (CC ED Pa. 1823). For evidence of the opinion’s impact on the Fourteenth Amendment’s drafting, see, e.g., AMAR, *supra* note 29, at 176–78; JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 28–30 (1980); KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* 26–28 (2014).

⁵² *Corfield*, 6 F. Cas. at 551.

⁵³ See RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* 243 (2021) (interpreting *Corfield* as demonstrating that “a judicially cognizable ‘privilege or immunity’ must have been longstanding and widespread, enjoyed by citizens of the United States as a matter of the positive law *of the states* or of the nation” (emphasis added)).

⁵⁴ U.S. CONST. amend. IX.

as the people themselves do indeed claim and celebrate these new rights in their words and/or actions.”⁵⁵ This reading of We the People’s ability to assert new unenumerated rights is buttressed by Section 5 of the Fourteenth Amendment, which grants Congress the power to enforce its provisions, including the Privileges or Immunities Clause.⁵⁶ According to Amar, the Amendment enables Congress and judges to “recognize new rights,” among them “emerging privileges and immunities embodied, among other places, in evolving American laws and practices.”⁵⁷ One of the clearest ways emerging rights may be embodied is in state practices.

III. RULES FOR STATE-COUNTING ANALYSES

While Part II establishes the legitimacy of state counting, there exist some questions about how to apply the methodology. First, what is the threshold at which the number of states achieves constitutional significance? Should it be a simple majority or a supermajority? Second, at what time should we count state practices? 1868 (the year of the Fourteenth Amendment’s ratification), a generation ago, or the present day? Below, I present three proposed approaches before proffering my own novel framework.

A. EXISTING SCHOLARSHIP ON STATE-COUNTING QUESTIONS

Steven G. Calabresi et al. have stressed the importance of the Article V three-fourths threshold, describing rights protected by three-fourths of states as “especially deeply rooted.”⁵⁸ As Calabresi and Michael W. Perl highlight, requiring a threshold as high as the Article V one is especially important because the Supremacy Clause makes the U.S. Constitution supersede any state statutes or constitutional provisions to the contrary.⁵⁹ Calabresi and Agudo also concentrate

⁵⁵ AMAR, *supra* note 32, at 108.

⁵⁶ U.S. CONST. amend. XIV, § 5. The full text reads as follows: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

⁵⁷ AMAR, *supra* note 32, at 109.

⁵⁸ Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1458 (2012).

⁵⁹ *Id.* at 444 (citing U.S. CONST. art. VI, cl. 2).

on the Fourteenth Amendment’s 1868 ratification as the key date to look at state practices.⁶⁰ After all, Calabresi believes that while the Article IV Privileges and Immunities Clause welcomes the development of new rights, the Fourteenth Amendment’s Privileges or Immunities Clause does not.⁶¹ Calabresi and Agudo thus argue that “[f]ocusing on *current* state constitutional law to determine what rights are deeply rooted in our history and tradition as a matter of substantive due process would obviously be mistaken.”⁶²

Still, practices protected by three-fourths of states in 1868 represent a floor, not a ceiling for rights protected by the Privileges or Immunities Clause.⁶³ Calabresi has suggested that some rights not meeting that threshold may still fall under the Clause’s protections.⁶⁴ Despite his aversion to looking at contemporary practices, he acknowledges that recognizing a right that develops after 1868—as Michael W. McConnell has suggested with respect to education—can be consistent with originalism if the Clause was originally understood as having an evolving meaning.⁶⁵

Although Randy E. Barnett and Evan D. Bernick agree with Calabresi that the Privileges or Immunities Clause protects rights “widespread and entrenched in 1868,”⁶⁶ they argue that the Clause also covers “those that might later come to be widespread and entrenched.”⁶⁷ They reject the notion that the Clause protects a “closed set” of rights for two reasons.⁶⁸ First, the Clause’s text

⁶⁰ Calabresi & Agudo, *supra* note 47, at 16.

⁶¹ Calabresi & Perl, *supra* note 46, at 449.

⁶² Calabresi & Agudo, *supra* note 47, at 14.

⁶³ Calabresi & Perl, *supra* note 46, at 443 (describing this threshold as a “minimum”).

⁶⁴ *Id.* at 446 (“There may well be some constitutional rights that are fundamental even if they were not recognized as being so by an Article V consensus of three-quarters of the states in 1868, when the Fourteenth Amendment was passed.”).

⁶⁵ *Id.* at 448–49 (citing Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995)); Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995)).

⁶⁶ BARNETT & BERNICK, *supra* note 53, at 243.

⁶⁷ *See, e.g., id.* at 29, 239 (discussing “other enumerated rights”).

⁶⁸ *Id.* at 240.

does not explicitly prevent expanding citizens' privileges or immunities, nor does it do so implicitly by listing a set of rights, for example.⁶⁹ Second, they read *Corfield's* language about rights that "have, at all times, been enjoyed by the citizens of the several States which compose this Union" to reference rights recognized by positive law.⁷⁰ Given that the set of rights deemed "fundamental" may evolve, as seen in enacted laws or constitutional provisions, the Clause thus welcomes such evolution.⁷¹ Their interpretation of *Corfield* is particularly persuasive in refuting Calabresi's understanding of the Clause as fixed in time.

However, Barnett and Bernick do not endorse looking at rights in the present. Rather, they cite *Corfield's* "at all times" verbiage to suggest that unenumerated rights must be "entrenched."⁷² Thus, they propose the following rule: rights enjoyed by citizens "for at least a generation—that is, thirty years or more— . . . as a consequence of the constitutional, statutory, or common law of a supermajority of the states, [are] presumptively a privilege of US citizenship."⁷³ Importantly, however, they concede that the thirty-year window "is a matter of construction and is not compelled by original meaning."⁷⁴ They further defend requiring rights to have settled for at least a generation by analyzing states' behaviors as laboratories of democracy.⁷⁵ Citing McConnell's work, they note that states often seek to observe the results of sister states' experiments before

⁶⁹ *Id.*

⁷⁰ *Id.* at 242–43. Note that Barnett and Bernick also believe that subsequent constitutional amendments expanded the privileges and immunities of citizens. *Id.* at 244–45.

⁷¹ *Id.* at 243.

⁷² *Id.*

⁷³ *Id.* at 246–47.

⁷⁴ *Id.* at 247. In a separate work, Barnett has analyzed the difference between interpretation and construction: "*Interpretation* is the activity of identifying the semantic meaning of a particular use of language in context. *Construction* is the activity of applying that meaning to particular factual circumstances." Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011). The idea derives from the work of Keith E. Whittington. See *id.* at 65 (citing KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 5–14 (1999)).

⁷⁵ This idea famously comes from Justice Louis Brandeis's opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

acting on their own.⁷⁶ In Barnett and Bernick’s view, courts should not interrupt the deliberative process of state innovation.⁷⁷ Moreover, asymmetrical costs exist when it comes to false positives (improper recognitions of rights) and false negatives (failures to recognize rights). While failing to recognize a right affects only the states that have not joined a national consensus, recognizing a right too early represents a national mandate that no state can avoid⁷⁸—reflecting Calabresi and Perl’s focus on the Supremacy Clause.⁷⁹

A third approach to counting states in determining unenumerated rights comes from Akhil Amar. Regarding timing, he defends counting states at the present moment on two textual grounds. First, he points to Section 5 of the Fourteenth Amendment—which grants Congress the power to enforce the Amendment⁸⁰—as evidence that the Amendment sought “to enable future Congresses to protect basic civil rights, both old and new.” He also sees a similar role for courts, which “were expected to play their part in the process to pay heed to emerging privileges and immunities embodied . . . in evolving American laws and practices.”⁸¹ Amar’s emphasis on *evolving* laws and practices evinces his view that it is legitimate to look at present-day practices to discern unenumerated rights. Indeed, this argument is buttressed by his analysis of the Ninth Amendment.⁸² Amongst its “core unenumerated rights” is that of the People to “discover and embrace new rights and to have these new rights respected by government.”⁸³

⁷⁶ BARNETT & BERNICK, *supra* note 53, at 250 (citing Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 683).

⁷⁷ For a recent case invoking similar reasoning, see *L.W. v. Skrmetti*, 73 F.4th 408, 416 (6th Cir. 2023) (Sutton, J.) (“Given the high stakes of these nascent policy deliberations—the long-term health of children facing gender dysphoria—sound government usually benefits from more rather than less debate, more rather than less input, more rather than less consideration of fair-minded policy approaches. To permit legislatures on one side of the debate to have their say while silencing legislatures on the other side of the debate under the U.S. Constitution does not further these goals.”).

⁷⁸ BARNETT & BERNICK, *supra* note 53, at 250.

⁷⁹ See *supra* text accompanying note 59.

⁸⁰ U.S. CONST. amend. XIV, § 5.

⁸¹ AMAR, *supra* note 32, at 109.

⁸² U.S. CONST. amend. IX.

⁸³ *Id.* at 108.

Amar has also offered ideas about appropriate thresholds for judicial enforcement of unenumerated rights. He rejects the Article V three-fourths threshold as too high, reasoning that judges counting state practices are “applying” the Ninth and Fourteenth Amendments and not “amending” the Constitution.⁸⁴ Moreover, the Article V threshold is intentionally high to protect against amendments that restrict individual rights (like the Eighteenth Amendment discussed in Chapter One); the need for a high threshold is obviated when it comes to recognizing new rights.⁸⁵ Indeed, it makes sense that the threshold for recognizing new rights should be lower than the threshold for an amendment to take away rights.⁸⁶ Thus, Amar proposes using Section 5 of the Fourteenth Amendment as a better metric than Article V for determining unenumerated rights. Although Section 5 refers specifically to congressional and not judicial enforcement power, he argues that this omission does not tie the judiciary’s hands: when Congress failed to exercise its Section 5 power, the Fourteenth Amendment anticipated that courts would step in.⁸⁷ However, Amar does not offer a specific rule of construction for implementing this vision. Instead, he suggests broadly that “judges should look for the same kind of broad national support for a new right that would warrant a properly motivated and smoothly functioning Congress to recognize the right under its own authority.”⁸⁸ In the following Section, I fill this gap by offering a clear Rule that reflects Section 5’s embrace of new rights.

⁸⁴ Akhil Reed Amar, *America’s Lived Constitution*, 120 *YALE L.J.* 1734, 1781–82 (2011).

⁸⁵ *Id.* at 1782.

⁸⁶ I thank Akhil Reed Amar for this point.

⁸⁷ Amar, *supra* note 84, at 1782.

⁸⁸ *Id.*

B. A NEW APPROACH TO STATE COUNTING

All three approaches in Section III.A have merits and links to the Constitution's text, history, and structure. Below, I offer my own, novel approach to counting states to determine unenumerated rights, synthesizing the evidence and arguments Calabresi et al., Barnett and Bernick, and Amar offer. My proposed methodology derives from three principles:

- 1) The Privileges or Immunities Clause of the Fourteenth Amendment locked in unenumerated rights in 1868. Even if state practice has since departed from protecting those rights, they remain constitutionally protected.⁸⁹
- 2) In response to Justice Antonin Scalia's concerns about a fulsome interpretation of the Clause leading to judicial overreach,⁹⁰ a clear rule for the necessary threshold of states is required.
- 3) While the Article V three-fourths threshold offers a clear rule—and reflects the structural principle that practices three-fourths of states agree on have constitutional significance⁹¹—that rule sets a higher bar for recognizing unenumerated rights than the Constitution requires. Instead, consistent with Amar's analysis, courts should adopt a rule reflecting Section 5 of the Fourteenth Amendment's vision for congressional enforcement and recognition of new rights.

⁸⁹ None of the scholars discussed in Section III.A appear to disagree with this principle.

⁹⁰ BARNETT & BERNICK, *supra* note 53, at 257.

⁹¹ Note also that three-fourths of the twelve states that attended the Constitutional Convention had to ratify the Constitution for it to take effect. (Rhode Island did not attend the Convention.) *See* Calabresi & Perl, *supra* note 46, at 443–44 (pointing to Article VII's language that the Constitution would take effect upon the ratification of nine states).

Here is my proposed framework for determining when a state-counting methodology compels the national recognition of an unenumerated right:

In either 1868 or the present day, at least one of the two Rules below must be satisfied for a right to gain national constitutional protection:

- 1) **Article V Rule:** The right is recognized by three-fourths of states, consistent with the Article V threshold for ratification.
- 2) **Section 5 Rule:** The right is supported by states with enough power to hold a congressional majority and the presidency—aligning with Section 5 of the Fourteenth Amendment—as reflected by satisfying the following three conditions:
 - a. A majority of states (reflecting a U.S. Senate majority) recognize the right;
 - b. A sufficient number of states for a U.S. House of Representatives majority (allocating all of a state’s House members in alignment with their state’s views) recognize the right; and
 - c. A sufficient number of states for an Electoral College majority recognize the right.

To the best of my knowledge, the Section 5 Rule for mirroring the House, Senate, and presidential approval needed to pass a law⁹² via a state count is novel.⁹³ Yet it reflects both the principles of Section 5 of the Fourteenth Amendment and provides a clear rule for courts to apply objectively.⁹⁴

⁹² See U.S. CONST. art. I, § 7, cl. 2. Given that Congress can override a presidential veto with a two-thirds vote in each chamber, *see id.*, perhaps two-thirds of states representing two-thirds of House districts would also be sufficient for rendering a punishment “unusual,” even if condition 2(c) is not satisfied.

⁹³ In the spirit of intellectual humility, I should note that I previously conducted a state-counting analysis based on the Article V Rule alone. See Ethan Yan, *An Originalist Case for Civic Education as a Constitutional Right*, 8 SUFFOLK U. L. REV. ONLINE (June 15, 2023), at 4–5. The addition of the Section 5 Rule represents a new development in my thinking.

⁹⁴ Litigants and jurists can easily evaluate the Section 5 Rule using online tools, assuming that they have a fifty-state survey available. One can count the number of states to complete the Senate analysis. For the Electoral College, there exist interactive maps for both 1868 and the present. See *1868 Presidential Election Interactive Map, 270 TO WIN*, https://www.270towin.com/1868_Election/interactive_map (last accessed Apr. 12, 2024); *2024 Presidential Election*

C. RESPONSES TO POTENTIAL CONCERNS ABOUT THE ARTICLE V AND SECTION 5 RULES

There exist reasonable arguments against my proposed rules to implement the Fourteenth Amendment's embrace of unenumerated rights. I respond to four potential ones below.

First, one might question why the Article V Rule is necessary, given that the Section 5 Rule requires fewer states. Yet not only does applying both rules give full meaning to the Constitution's rights-protection mechanisms, but it also has practical consequences. Unanimous support in thirty-eight states (exceeding the Article V three-fourths threshold) guarantees only 178 (or 40.9% of) House members and 254 (or 47.2% of) electoral votes.⁹⁵ Thus, it is possible that the Section 5 Rule is not satisfied but the Article V one is.

Second, one might argue that the Section 5 Rule in particular undermines the deliberative process of states functioning as laboratories of democracy.⁹⁶ For example, Sutton has asked whether the Court might have been better off waiting for three-fourths or two-thirds of states to support the exclusionary rule before nationalizing it,⁹⁷ as opposed to the bare majority sufficient in *Mapp v. Ohio*.⁹⁸

Two responses to this concern. First, my proposed Rule does not allow all combinations of twenty-six states to nationalize rights; the states must meet the House and Electoral College

Interactive Map, 270 TO WIN, <https://www.270towin.com/> (last accessed Apr. 12, 2024). The House analysis is a little trickier but not overly complex. One can take the Electoral College map results and subtract two votes from each state that recognizes a right.

⁹⁵ For these data (from which I added the thirty-eight least-populous states), see *Number of Representatives by State 2024*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/number-of-representatives-by-state> (last accessed Apr. 21, 2024); *Electoral Votes by State 2024*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/electoral-votes-by-state> (last accessed Apr. 21, 2024). Note that with the Electoral College, there is a slight wrinkle in that Washington, D.C. has electoral votes under the Twenty-Third Amendment, yet would not count as a "state" for Article V purposes. *Id.* amend. XXIII. Thus, D.C.'s practices should count under the Section 5 Rule but not the Article V Rule.

⁹⁶ See *supra* text accompanying notes 76–79 (raising a similar point). On this issue, I benefited from a conversation with Derek A. Webb.

⁹⁷ SUTTON, *supra* note 3, at 75–76.

⁹⁸ See *supra* note 18.

majority thresholds as well. Controlling a majority of states guarantees only 72 of 435 House seats⁹⁹ and 130 of 538 Electoral College votes.¹⁰⁰ In fact, controlling two-thirds of states guarantees only 141 House members and 209 electoral votes, representing just 32.4% and 38.8% of their respective entities.¹⁰¹ Thus, the Section 5 Rule is not as lenient as it may appear initially.

Second, while empowering unelected judges to nationalize rights may raise democratic concerns, the Section 5 Rule also promotes a democratic conversation between states and the Court.¹⁰² Should the Court nationalize a right based on the assent of twenty-six states under the Section 5 Rule, those against the Court’s decision could channel their efforts into persuading one of those states to flip, thereby undermining the basis of the Court’s decision. Moreover, the ability to reverse a Court decision without having to change the Court’s composition might reduce the political contentiousness of the confirmation process—a goal proponents of reforming the Court have championed.¹⁰³

A third plausible argument against the Article V and Section 5 Rules is that they hamstring judges by removing their independent decision-making and requiring them to apply a rigid formula.¹⁰⁴ In Eighth Amendment cases, for example, the Court has rejected treating state practices as dispositive by stressing its duty to “exercise . . . independent judgment.”¹⁰⁵ Two responses to this objection as well.

⁹⁹ For these data (from which I added the twenty-six least-populous states), see *Number of Representatives by State 2024*, *supra* note 95.

¹⁰⁰ See *Electoral Votes by State 2024*, *supra* note 95.

¹⁰¹ For these data (from which I added the thirty-four least-populous states), see *Number of Representatives by State 2024*, *supra* note 95; *Electoral Votes by State 2024*, *supra* note 95.

¹⁰² For examples of dialogue between state courts and legislatures on education funding, see SUTTON, *supra* note 3, at 31–33.

¹⁰³ See, e.g., Akhil Reed Amar, *Term Limits/Time Rules for Future Justices: Eighteen Arguments for Eighteen Years*, 2023 CATO SUP. CT. REV. 9, 13 (“Shortened terms of active service will reduce the stakes—and the temperature—of currently overheated Court confirmation battles.”).

¹⁰⁴ On this point, I benefited from a conversation with Jordan Kei-Rahn.

¹⁰⁵ *Graham v. Florida*, 560 U.S. 48, 67 (2010).

First, because state counting presents a floor, not a ceiling for unenumerated rights, judges still have a responsibility to evaluate whether rights fall within our nation’s “history and tradition”¹⁰⁶ as determined by indicia other than state practices. Second, the Article V and Section 5 Rules promote judicial restraint and clearly administrable rules—a positive aspect of reducing judicial discretion. Derek A. Webb has argued that between 1780 and 1900, broad agreement existed in favor of such restraint.¹⁰⁷ In fact, Alexander Hamilton argued in *The Federalist* No. 78 that “[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them”¹⁰⁸ And, in the words of Judge Amul R. Thapar, “Justice Scalia preferred bright-line rules to looser standards . . . to avoid judicial policymaking,” because “avoiding judicial policymaking is necessary to our constitutional tradition.”¹⁰⁹ My proposed Article V and Section 5 Rules reflect Scalia’s preference,¹¹⁰ as opposed to the looser standard of “broad national support for a new right that would warrant a properly motivated and smoothly functioning Congress to recognize the right” that Amar suggests.¹¹¹

¹⁰⁶ *Washington v. Glucksberg*, 521 U.S. 720–21 (1997) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

¹⁰⁷ Derek A. Webb, *The Lost History of Judicial Restraint*, 100 NOTRE DAME L. REV. (forthcoming 2024), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4773668. While Webb focuses on standards of review, the broader historical point still holds.

¹⁰⁸ THE FEDERALIST NO. 78, at 407 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

¹⁰⁹ Amul R. Thapar, *Smith, Scalia, and Originalism*, 68 CATH. U. L. REV. 687, 691 (2019) (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–77 (1989)).

¹¹⁰ It also aligns with those who view originalism as an empirical inquiry into linguistic meaning. See, e.g., Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. L. REV. 433, 438 n.19 (2023) (quoting Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 52 (2018)); see also James C Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool To Make Originalism More Empirical*, 126 YALE L.J.F. 21 (2016).

¹¹¹ See *supra* note 88 and accompanying text. For those who view the binding Article V and Section 5 Rules as overly restrictive, the Rules remain useful as highly persuasive “guidelines” or metrics for discerning how deeply entrenched rights are. I thank David R. Mayhew for this suggestion.

The fourth and final argument against the Article V and Section 5 Rules I shall address is the concern that a state-counting approach creates an “irreversible ratchet” whereby once a right is granted, it can never be taken back.¹¹² Given incorporation and the Supremacy Clause, adopting the Section 5 Rule could mean that once twenty-six states recognize a right, twenty-four additional ones would be bound by it as well. However, judicial nationalization of rights may not be as permanent as one might think.

Consider a right the Court enshrines as a privilege or immunity of citizens under either the Article V or Section 5 Rules. While courts in all fifty states would be required by the Supremacy Clause to enforce the right,¹¹³ they could assert specifically that this right is not protected by their state constitutions. State legislatures could also enact so-called “trigger laws” that would revoke the right if the Article V and Section 5 thresholds are no longer met.¹¹⁴ Once enough states have enshrined their opposition to the right such that neither threshold is met, the Court could declare

¹¹² Tonja Jacobi has insightfully highlighted this point in the context of state counting in Eighth Amendment jurisprudence. See Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1119–23 (2006). For a contrary perspective, see generally Roderick M. Hills, Jr., *Counting States*, 32 HARV. J. L. & PUB. POL’Y 17 (2009).

One might additionally criticize the enterprise of counting states because some states were created to boost the Republican Party’s political prospects, as well as the fact that some states’ constitutional provisions may have been copied from other states’ constitutions. See Philip Bump, *A Senator of a State Created for Partisan Advantage Laments the Partisanship of Adding D.C. as a State*, WASH. POST (Mar. 23, 2021, 2:12 PM), <https://www.washingtonpost.com/politics/2021/03/23/senator-state-created-partisan-advantage-laments-partisanship-adding-dc-state/>; Jason Mazzone & Cem Tecimer, *Interconstitutionalism*, 132 YALE L.J. 326, 363–64 (2022) (noting that the California Constitution’s free-speech clause derives from that in the New York Constitution and suggesting that understanding the original meaning of California’s clause thus requires understanding that of New York’s clause). However, Article V is agnostic to the history behind a state’s admission to the Union, as well as whether a state’s ratification of an amendment is influenced by that of another state. Similarly, how a state entered the Union does not affect its representation in the House, Senate, or Electoral College. A state-counting methodology should likewise ignore these concerns. Indeed, treating states differently based on the history behind their admission to the Union would violate the equal-footing doctrine, which holds that states enter the Union on the same terms as existing and future states. See, e.g., AMAR, *supra* note 32, at 259 (discussing the Northwest Ordinance as the doctrine’s source).

¹¹³ U.S. CONST. art. VI, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

¹¹⁴ Such “trigger laws” would resemble some states’ provisions that either reduced abortion rights automatically or could do so swiftly via state officials’ certification following the overturning of *Roe v. Wade*. Devan Cole & Tierney Sneed, *Where Abortion ‘Trigger Laws’ and Other Restrictions Stand After the Supreme Court Overturned Roe v. Wade*, CNN (July 4, 2022, 8:20 PM), <https://www.cnn.com/2022/06/27/politics/states-abortion-trigger-laws-roe-v-wade-supreme-court/index.html>.

that the right is no longer within our country's history and tradition—thus not requiring its nationwide enforcement. Note that this scenario is not fantastical. Congress and thirty-five states led the Court to reconsider its opposition to the death penalty in the 1970s.¹¹⁵ Inasmuch as Court reversal in the face of state opposition appears implausible, it is less of an indictment on the state-counting methodology and more of a recognition that it is difficult for states to satisfy the Article V or Section 5 Rules in protecting a right not enumerated in the U.S. Constitution.

In short, the Article V and Section 5 Rules provide clear and objective guidance to courts about unenumerated rights that deserve national constitutional protection. Both rules are necessary, inspire democratic dialogue between states and the national government, promote judicial restraint without eliminating the judicial role, and do not guarantee an irreversible one-way ratchet.

IV. RECOGNIZING NEW RIGHTS: APPLYING THE ARTICLE V AND SECTION 5 RULES

At this point, it is natural to wonder what results these Rules would yield given state practices today. I have eschewed conducting a meticulous analysis in this regard to avoid creating rules to promote results I desire. However, it is worth discussing how my proposed Rules would apply to some rights discussed above, as well as others Calabresi et al. have highlighted. I proceed by following the order of issues discussed in Part I.

Starting with the exclusionary rule: as noted above, the Court in *Mapp* required all fifty states to adopt the rule in part because a bare majority of states (twenty-six) mandated it in some form. Regardless of whether those states were sufficient to reflect an entrenched right at the time, forty-six state constitutions—exceeding the Article V three-fourths threshold—require the exclusionary rule's application as of 2018.¹¹⁶ Thus, even if *Mapp* were incorrect when decided, a national exclusionary rule should be a constitutional requirement today under the Article V Rule.

¹¹⁵ Amar, *supra* note 84, at 1783 n.118.

¹¹⁶ SUTTON, *supra* note 3, at 66-67.

Indeed, Amar has argued that “[i]f enough people believe in a given right and view it as fundamental,” even if this belief was spurred by an incorrect Court ruling, the Ninth Amendment would protect it.¹¹⁷ Thus, his interpretation of the Amendment would seem to enshrine the exclusionary rule’s constitutionality, despite his longstanding opposition to the rule.¹¹⁸

State counting also sheds light on whether the Court should complete its incorporation of the Bill of Rights by requiring states to adhere to the Third Amendment’s prohibition on quartering troops, the Fifth Amendment’s requirement of grand juries to indict, and the Seventh Amendment’s civil-jury requirement.¹¹⁹ According to Calabresi et al.’s analysis of state practices in 2018, forty-two state constitutions prohibit the quartering of troops, exceeding the three-fourths threshold that would merit incorporation under the Article V Rule.¹²⁰ However, only twenty-three states as of 2019 require grand-jury indictments for serious crimes,¹²¹ suggesting that the Fifth Amendment’s requirement in this regard ought not be incorporated—at least on state-counting grounds. After all, neither the Article V nor Section 5 thresholds are met. Finally, forty-nine states’ constitutions protect the right to a jury trial in civil- or common-law cases,¹²² strongly supporting the Seventh Amendment’s incorporation.¹²³

¹¹⁷ Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 162–63 (2008).

¹¹⁸ For examples of Amar’s arguments against the exclusionary rule, see, for example, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785–800 (1994); Akhil Reed Amar, *Against Exclusion (Except to Protect Truth or Prevent Privacy Violations)*, 20 HARV. J.L. & PUB. POL’Y 457 (1997); AMAR, *supra* note 32, at 172–83.

¹¹⁹ For the list of provisions in the Bill of Rights not yet incorporated against state governments, see Jeffrey S. Sutton, *What Should Be National and What Should Be Local in American Judicial Review*, 2022 SUP. CT. REV. 191, 197 n.19.

¹²⁰ Calabresi et al., *supra* note 49, at 84–85.

¹²¹ Daniel Taylor, *Which States Use Criminal Grand Juries*, FINDLAW (Mar. 21, 2019), <https://www.findlaw.com/legalblogs/criminal-defense/which-states-use-criminal-grand-juries/>.

¹²² Calabresi et al., *supra* note 49, at 113–16. All twelve states that rewrote their constitutions between 1776 and 1791 included such a right, as did thirty-six of thirty-seven in 1868.

¹²³ For a different view—that the right to a civil jury in federal court depends on whether the state where the case is being heard requires a civil jury trial—see AMAR, *supra* note 21, at 89–93; AKHIL REED AMAR, *THE LAW OF THE LAND: A GRAND TOUR OF OUR CONSTITUTIONAL REPUBLIC* 257–58 (2015). Indeed, this perspective raises a methodological question about the propriety of state counting in determining incorporation. After all, some aspects of the first ten amendments do not sensibly incorporate against state governments; a more obvious example than Amar’s view of the Seventh Amendment is the Tenth Amendment, which reads as follows: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the

My state-counting Rules also identify unenumerated rights that the Court has not yet recognized. Two of the many state rights without federal constitutional parallels that Calabresi et al. have documented are worth highlighting. First, forty-six state constitutions protect against class-based legislation, which includes “any law that separates the population into groups such that one group is advantaged and one group is relegated to a form of second-rate or second-class citizenship,” which “can occur through laws that grant special benefits to some groups that are not equally granted to others.”¹²⁴ Second, thirty of thirty-seven states in 1868 and all fifty states today guarantee free public-school education.¹²⁵ Because these two rights are protected by at least three-fourths of state constitutions, they warrant national constitutional protection under the Article V Rule.

The right to education is worth further discussion since the Court in *San Antonio Independent School District v. Rodriguez* explicitly rejected the idea that education is a fundamental right under the Constitution.¹²⁶ The data from 1868 and 2018 suggest that the Court erred in this regard. Nor was it unaware of states’ widespread guarantees to public-school education. In dissent, Justice Thurgood Marshall noted that forty-eight of fifty states at the time had constitutional mandates for such education.¹²⁷

CONCLUSION

States can and have played a role in expanding rights relating to criminal procedure, sexual freedoms, and bearing arms. Given the numerous constitutional bases for a state-counting methodology, we should expect the Court to continue relying on it—perhaps leading to expansions

people.” U.S. CONST. amend. X. It would seem odd to incorporate against state governments a provision that guarantees powers to those governments.

¹²⁴ Calabresi et al., *supra* note 49, at 136–41.

¹²⁵ *Id.* at 143–46.

¹²⁶ 411 U.S. 1 (1973).

¹²⁷ *Id.* at 111–12 (Marshall, J., dissenting).

of rights to education, civil juries, freedom from class-based discrimination, and more. When it does so, the Court may wish to provide clear guidance on the appropriate thresholds for determining when the U.S. Constitution requires protecting a right. This Chapter suggests a new framework for such guidance, centered around two Rules: the Article V Rule, under which three-fourths of states can entrench a national right; and the Section 5 Rule, under which states representing House, Senate, and Electoral College majorities can have similar national influence.

This Chapter also raises several questions for future research. First, recall Chief Judge Jeffrey S. Sutton's thought experiment about how exclusionary-rule jurisprudence might have developed if the Court had waited until a supermajority of states had adopted the rule.¹²⁸ It may be worth investigating the relationship between the proportion of states that recognized a right before the Court imposed it nationally and public approval of the Court's decision as seen in polling data.¹²⁹

Second, scholars might be interested in analyzing how judges employ state counting. One could look at a sample of cases in which state counting could have been used and look at which cases did and did not use it. As one example, the Court did not find it significant in *San Antonio v. Rodriguez* that forty-eight of fifty states had public-education mandates in their Constitutions, despite Justice Thurgood Marshall's citation of the statistic in dissent.¹³⁰ When judges do look at state practices, it is worth studying the centrality of state counting to their conclusions. Political scientists could use the placement of state counting in an opinion as an indicator; an earlier discussion of the method might signify greater importance.

¹²⁸ See *supra* notes 97–98 and accompanying text.

¹²⁹ However, such a statistical analysis would have to reckon with a small sample size of cases and the lack of independence between states' decisions to protect rights.

¹³⁰ See *supra* text accompanying notes 125–126.

Third, a benefit of state-counting methodologies in general is that they provide an objective means to insulate court rulings from personal biases. However, such an approach could still yield results tending to favor certain political persuasions, although this Chapter's few data points do not reveal an obvious skew. To pick two examples, conservatives might celebrate the state-counting methodology's support of gun rights while liberals would embrace the sexual-privacy advances it has produced. A finding against clear biases in the outcomes produced by the Article V and Section 5 Rules would be valuable in encouraging their greater adoption.

Should future researchers pursue these questions, this Chapter will have already succeeded in demonstrating states' importance nationally. State practices have expanded individual rights across the country, and states are worthy arenas for championing rights that may not yet be recognized nationally. I turn now to another area in which courts have looked at state practices to determine national rights: criminal sentences.

CHAPTER THREE: COUNTING STATE PRACTICES TO DETERMINE “UNUSUAL” SENTENCES UNDER THE EIGHTH AMENDMENT*

INTRODUCTION

While state counting may not follow obviously from the Ninth or Fourteenth Amendment’s texts, the Eighth Amendment’s prohibition of “cruel and unusual punishments”¹ more clearly welcomes such a methodology. After all, state practices provide an objective means of determining whether specific punishments are “usual” in the United States. Thus, the Court has regularly looked at the collective wisdom of states in its Eighth Amendment cases.²

This Chapter describes and analyzes the Court’s use of state counting in determining the constitutionality of criminal sentences. Part I summarizes the scholarly and judicial debate over the Amendment’s meaning. Part II analyzes how the U.S. Supreme Court has counted state practices to assess whether a punishment is “unusual.” Here, I make a unique contribution in presenting a table with the number of states opposed to each punishment in twelve opinions and analyzing the numbers driving the justices’ conclusions. Part III discusses methodological questions relating to how states should be counted. I demonstrate how my Article V and Section 5 Rules from the previous Chapter can apply to Eighth Amendment state counting and criticize scholars’ and the Court’s reliance on trends to determine unusualness. Ultimately, this Chapter’s underlying purpose is not to critique or laud the Court’s jurisprudence. Rather, I seek to show through the lens of the Amendment that states can drive, not just obstruct, national change.

* An early version of this Chapter was presented at the 2024 Pi Sigma Alpha National Student Research Conference. I am grateful for the feedback I received from conference participants, especially my discussant, Victoria Worley. Thanks also to Kyle Lewis for spurring my interest in state counting for Eighth Amendment cases.

¹ U.S. CONST. amend. VIII.

² See *infra* Table 2.

I. THE MEANING OF “UNUSUAL”

The text of the Eighth Amendment reads as follows: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”³ The grammatical and logical structure of the adjectives describing “punishments” suggests that they must be both “cruel” and “unusual” to be unconstitutional.⁴ To give full effect to the Amendment’s meaning, judges should interpret each adjective separately.⁵ Thus, the government can prevail by demonstrating only that the punishment is not “unusual.” While the current Court has begun embracing a distinction between cruelty and unusualness, this position is not incontrovertible.

Consider first how prominent justices appointed by both Democratic and Republican presidents have analyzed the Eighth Amendment. Justice Thurgood Marshall argued that the word “unusual” was added unintentionally to the English Bill of Rights of 1689 and that the Eighth Amendment’s history provides no insight into its original meaning.⁶ According to John F. Stinneford, Justices Antonin Scalia and Clarence Thomas have similarly ignored the word “unusual,” albeit not as explicitly as Marshall.⁷

Instead, jurists like Scalia and Thomas have argued that an Eighth Amendment analysis should focus on comparing modern punishments with those when the Amendment was ratified in 1791. Early court decisions on the Amendment concentrated on whether punishments were similar to those considered “cruel and unusual” in 1791.⁸ In deemphasizing the word “unusual,” Justices

³ U.S. CONST. amend. VIII.

⁴ See Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 604–15 (2010).

⁵ *Id.* at 615.

⁶ *Furman v. Georgia*, 408 U.S. 238, 318, 331 (1972) (Marshall, J., concurring).

⁷ John F. Stinneford, *Against Cruel Innovation: The Original Meaning of the Cruel and Unusual Punishments Clause, and Why It Matters Today*, NAT’L CONST. CNTR., <https://constitutioncenter.org/the-constitution/amendments/amendment-viii/clauses/103> (last accessed Feb. 3, 2024).

⁸ *Furman*, 408 U.S. at 264–65 (Brennan, J., concurring).

Scalia and Thomas have echoed the approach of those early cases.⁹ For example, the former joined the latter’s concurrence in *Baze v. Rees* (2008) that averred the following: “The Eighth Amendment’s prohibition on the ‘inflict[ion]’ of ‘cruel and unusual punishments’ must be understood in light of the historical practices that led the Framers to include it in the Bill of Rights.”¹⁰ Based on this history, Thomas concluded that “[t]he evil the Eighth Amendment targets is intentional infliction of gratuitous pain.”¹¹

While the Court’s treatment of cruelty and unusualness “has been somewhat inconsistent,”¹² Scalia’s and Thomas’s views do not control today. In *Bucklew v. Precythe*, the Court defined and considered the meanings of “cruel” and “unusual” separately.¹³ It has also consciously disentangled Eighth Amendment jurisprudence from a focus on the types of punishments the Framers aimed to prohibit. The defining language governing the Amendment’s interpretation over the last fifty years comes from *Trop v. Dulles*: “The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹⁴ This standard remains good law.¹⁵ Indeed, the Court has explicitly rejected focusing only on the historical standards of 1685 or 1791 and ignoring contemporary practices.¹⁶

⁹ See Stinneford, *supra* note 7.

¹⁰ 553 U.S. 35, 94 (2008) (Thomas, J., concurring in the judgment).

¹¹ *Id.* at 102.

¹² Ryan, *supra* note 4, at 592.

¹³ *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123–24 (2019).

¹⁴ 356 U.S. 86, 101 (1958) (plurality opinion).

¹⁵ *United States v. Briggs*, 141 S. Ct. 467, 472 (2020) (citations omitted). However, Justice Samuel Alito (joined by Scalia) has cited *Trop* for the proposition that “[t]he Court long ago abandoned the original meaning of the Eighth Amendment.” *Miller v. Alabama*, 567 U.S. 460, 510 (2012) (Alito, J., dissenting) (citations omitted).

¹⁶ *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). Note that the Court has not completely abandoned a historical analysis. Rather, it considers both historical and contemporary practices. *Id.* at 339–40 (Scalia, J., dissenting) (citations omitted) (noting the types of unconstitutional punishments reflected in the Court’s Eighth Amendment jurisprudence). In the academy, Stinneford has offered a middle-ground approach to determining “usualness”: “As used in the Eighth Amendment, the word ‘unusual’ was a term of art that referred to government practices that are contrary to ‘long usage’ or ‘immemorial usage.’” John F. Stinneford, *The Original Meaning of ‘Unusual’: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745 (2008). Under this approach, courts could still look to contemporary practices but could limit only state innovations that have long been abandoned. While Stinneford’s work was cited approvingly by Justice Neil Gorsuch’s majority opinion in *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019), it remains to be seen whether it becomes the binding approach to “usualness” analyses. It is worth noting that

To ascertain society’s standards of decency today, the Court has prioritized analyzing “objective indicia . . . as expressed in legislative enactments and state practice.”¹⁷ A “national consensus” against a practice is strong evidence that it violates the Eighth Amendment.¹⁸ True, the Court has considered jury determinations¹⁹ and international law²⁰ and stressed that it remains responsible for the “exercise of independent judgment.”²¹ Still, it has held that “the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”²² Thus, the Court gives “great weight” to counts of state practices (and federal legislative enactments) in determining whether a punishment is unconstitutional.²³ Part II proceeds to describe and analyze the Court’s state-counting methodology concerning the Amendment.

II. ANALYZING THE COURT’S STATE COUNTING FOR CRIMINAL SENTENCES

To analyze the use of state counting in Eighth Amendment cases, I began by consulting *Justia*’s selection of “Death Penalty & Criminal Sentencing Supreme Court Cases.”²⁴ While the page does not purport to enumerate every Court case relating to the Amendment, it provided a starting point of twenty-nine cases. I then eliminated fourteen cases that focused on procedural

Stinneford’s approach to the Eighth Amendment mirrors Randy E. Barnett and Evan D. Bernick’s suggestion that the privileges or immunities of U.S. citizens should be determined by looking at rights enjoyed by citizens in a supermajority of states for at least thirty years. U.S. CONST. amend. XIV, § 1, cl. 2; RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* 246–47 (2021).

¹⁷ *Graham v. Florida*, 560 U.S. 48, 61 (2010) (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)).

¹⁸ *See, e.g., id.* at 67.

¹⁹ *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 181–82 (1976) (plurality opinion).

²⁰ *See, e.g., Graham*, 560 U.S. at 80–82. Joined by Justices Scalia and Thomas, Chief Justice William Rehnquist castigated the Court’s reliance on international law and opinion polls in his dissent in *Atkins v. Virginia*, arguing that legislative enactments and jury decisions alone should inform the Court’s “usualness” analysis. 536 U.S. 304, 324–28 (2005) (Rehnquist, C.J., dissenting).

²¹ *Graham*, 560 U.S. at 67.

²² *Id.* at 62 (quoting *Atkins*, 536 U.S. at 312) (cleaned up).

²³ *Id.* at 67 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 434 (2008)).

²⁴ *Death Penalty & Criminal Sentencing Supreme Court Cases*, JUSTIA, <https://supreme.justia.com/cases-by-topic/death-penalty-criminal-sentencing/> (last accessed Feb. 2, 2024). As a brief defense of my reliance on *Justia*, the Duke Law Library has recommended the website as a useful source for research on federal cases. *See* Jennifer L. Behrens, *Court Records and Briefs*, DUKE LAW: GOODSON LAW LIBR. (July 2017), <https://law.duke.edu/lib/research-guides/court-records-briefs/>.

requirements to impose the death penalty or methods of execution.²⁵ Note that this winnowing procedure led to the omission of some discussions of state counting.²⁶ However, the Court has held that the state-counting analysis for procedural issues differs from that for substantive questions about the constitutionality of a punishment.²⁷ This distinction makes sense given that procedural cases implicate the Due Process Clauses of the Fifth and Fourteenth Amendments.²⁸ Because this Chapter aims to discern the role of state counting in determining whether punishments are “unusual” under the Eighth Amendment, I thus concentrate on cases involving substantive questions. This focus led also to the exclusion of one case that revolved around racial discrimination,²⁹ three that concentrated on the proportionality of punishments,³⁰ and one that

²⁵ The following cases were eliminated from my analysis: *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) (holding that a finding of permanent incorrigibility is not required for sentencing a minor to life in prison without the possibility of parole); *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) (concerning a method of execution); *Glossip v. Gross*, 576 U.S. 863 (2015) (same); *Miller v. Alabama*, 567 U.S. 460 (2012) (concerning a mandatory-sentencing scheme); *Greenlaw v. United States*, 554 U.S. 237 (2008) (holding that U.S. Courts of Appeal cannot, on their own, increase a sentence); *Baze v. Rees*, 553 U.S. 35 (2008) (concerning a method of execution); *Oregon v. Guzek*, 546 U.S. 517 (2006) (concerning a limit on evidence allowed at sentencing hearings); *Kansas v. Marsh*, 548 U.S. 163 (2006) (concerning the weighing of aggravating and mitigating circumstances in death sentences); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (concerning proof requirements for sentencing enhancements); *Walton v. Arizona*, 497 U.S. 639 (1990) (concerning a statute’s vagueness and which facts must be proved before a jury versus a judge for sentencing purposes); *Pulley v. Harris*, 465 U.S. 37 (1984) (concerning the factors state appellate courts must consider in upholding death sentences); *Beck v. Alabama*, 447 U.S. 625 (1980) (forbidding jury-imposed death sentences when juries could not consider guilty findings for lesser-included offenses); *Lockett v. Ohio*, 438 U.S. 586 (1978) (concerning the consideration of mitigating factors in death-penalty cases); *Williams v. New York*, 337 U.S. 241 (1949) (discussing the information a sentencing judge can consider).

²⁶ Consider, for example, *Miller v. Alabama*, 567 U.S. 460 (2012). There, the Court held that “mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment[.]” *Id.* at 465. In doing so, it discounted the fact that twenty-eight states and the federal government permitted such a punishment. *Id.* at 482–89. Justice Clarence Thomas’s dissent highlighted these twenty-nine jurisdictions’ practices in explaining his support for the constitutionality of this sentencing regime. *Id.* at 504 (Thomas, J., dissenting).

²⁷ *Miller*, 567 U.S. at 483 (citations omitted).

²⁸ See U.S. CONST. amends. V, XIV, § 1, cl. 3.

²⁹ *McCleskey v. Kemp*, 481 U.S. 279 (1987). This case revolved around a study showing racial discrimination in Georgia death sentences and whether it rendered the defendant’s death sentence unconstitutional. *Id.* at 282–83. In upholding the sentence, the Court noted that thirty-seven states and Congress authorized the death penalty. *Id.* at 310 n.32.

³⁰ *Ewing v. California*, 538 U.S. 11 (2003) (upholding California’s Three Strikes Law); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (discussing the Eighth Amendment’s proportionality requirements); *Solem v. Helm*, 463 U.S. 277 (1983) (holding that the Eighth Amendment forbids grossly disproportionate sentences). Two of these cases nevertheless conducted a state-counting analysis. *Solem* noted that the defendant would not have suffered as severe of a punishment in any other state, 463 U.S. at 300, while *Ewing* mentioned that between 1993 and 1995, twenty-four states and the federal government enacted some sort of three-strikes legislation. *Id.* at 15.

discussed whether a defendant was mentally competent enough to be executed.³¹ Additionally, based on Tonja Jacobi’s analysis of state counting in Eighth Amendment cases,³² I added two decisions for consideration, *Enmund v. Florida*³³ and *Thompson v. Louisiana*,³⁴ leaving a total of twelve cases for analysis.

This methodology is not perfect. Critics may assert that it leaves out important cases not mentioned by *Justia* or question my decisions to omit cases *Justia* includes. Yet the remaining twelve cases still yield fruitful analyses. The first such case is *Weems v. United States* (1910). There, the Court explicitly declined to conduct “[a]n extended review of the cases in the state courts interpreting their respective constitutions.”³⁵ Given that *Weems* did not employ a state count, I have omitted it from the table below. However, with *Trop*’s focus on “evolving standards of decency”—and better technological capabilities to access statutes and cases nationwide—the Court in the 1970s began consistently conducting state-counting analyses to determine whether punishments were constitutional.

Table 2 below summarizes the state-counting methodologies employed in the remaining eleven cases I have selected (with *Weems* excluded). The first column lists the case and the opinion’s author if appropriate. The second column provides a qualitative summary of the opinion’s counting of states. The third column details the number of states that opposed the punishment under consideration. The fourth column lists the punishment that the Court considered the constitutionality of, and the fifth column includes the Court’s conclusion. “Struck Down” indicates that the Court (or opinion) found against the constitutionality of the punishment, whereas

³¹ *Madison v. Alabama*, 139 S. Ct. 718 (2019) (not conducting a state-counting analysis).

³² Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1095–96 (2006).

³³ 458 U.S. 782 (1982).

³⁴ 487 U.S. 815 (1988).

³⁵ 217 U.S. 349, 377 (1910).

“Upheld” denotes the opposite. For example, the Court in *Gregg v. Georgia* held that the death penalty is constitutionally permissible, but it found the death penalty unconstitutional for juveniles in *Roper v. Simmons*.

Two notes of clarification before presenting Table 2. First, while I focus on eleven cases, I present twelve opinions. I include two concurrences from *Furman v. Georgia* that demonstrate how jurists can look at the same data and count states in different ways. Second, for the third column’s state count, there exist wrinkles in determining the appropriate number of “Opposing States.” Opinions often include additional statistics—for example, relating to the recent applications of a sentencing scheme—that supplement the opinion but are not required for its holding. However, the Court in *Kennedy v. Louisiana* expressed its view on the threshold needed for the rulings in *Enmund v. Florida*, *Atkins v. Virginia*, and *Roper v. Simmons*.³⁶ For those three cases, I have deferred to the *Kennedy* count of states. For the only other opinion with some ambiguity—Justice Brennan’s concurrence in *Furman v. Georgia*—I have used the most generous possible count of opposing states, which I believe is most faithful to the opinion. While this methodology may also be contested, the qualitative description in the second column enables readers to conduct their own counts, should they so choose.

³⁶ 554 U.S. 407, 426 (2008).

TABLE 2: NUMBER OF STATES OPPOSING PUNISHMENTS CONSIDERED BY THE COURT

Case	State-Counting Analysis	Opposing States	Punishment	Ruling
<i>Furman v. Georgia</i> (Brennan, J., concurring) (1972)	10 states prohibit the death penalty, ³⁷ 5 “have almost totally abolished death as a punishment for crimes,” ³⁸ and 6 “have made virtually no use of it.” ³⁹	21	Death Penalty	Struck Down
<i>Furman v. Georgia</i> (Marshall, J., concurring) (1972)	“At the present time, 41 States, the District of Columbia, and other federal jurisdictions authorize the death penalty for at least one crime.” ⁴⁰	9	Death Penalty	Struck Down
<i>Gregg v. Georgia</i> (1976) (plurality opinion)	At least 35 states and Congress authorized the death penalty in some cases following <i>Furman</i> . ⁴¹	15 or fewer	Death Penalty	Upheld
<i>Coker v. Georgia</i> (1977) (plurality opinion)	In 1971, 16 states and the federal government authorized the death penalty for rape. ⁴² At the time of <i>Coker</i> , Georgia was the only one that did so for the rape of an adult woman (in part because of <i>Furman</i>). ⁴³	49	Death Penalty for the Rape of an Adult Woman	Struck Down
<i>Enmund v. Florida</i> (1982)	8 states allow the death penalty for participation in a robbery that unintentionally leads to murder and 9 additional ones permit death sentences “if sufficient aggravating circumstances are present to outweigh mitigating circumstances.” ⁴⁴	42 ⁴⁵	Death Penalty for Felony Murderer Without Intent to Kill	Struck Down
<i>Ford v. Wainwright</i> (1986)	“Today, no State in the Union permits the execution of the insane.” ⁴⁶	50	Death Penalty for Insane Defendants	Struck Down

³⁷ *Furman v. Georgia*, 408 U.S. 238, 298 n.52 (1972) (Brennan, J., concurring).

³⁸ *Id.* at 298 n.53.

³⁹ *Id.*

⁴⁰ 408 U.S. 238, 341 (Marshall, J., concurring).

⁴¹ *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976) (plurality opinion).

⁴² *Coker v. Georgia*, 433 U.S. 584, 593 (1977) (plurality opinion).

⁴³ *Id.* at 595–96 (plurality opinion).

⁴⁴ *Enmund v. Florida*, 458 U.S. 782, 792 (1982).

⁴⁵ For the *Kennedy* count, see 554 U.S. at 426.

⁴⁶ *Ford v. Wainwright*, 477 U.S. 399, 408 (1986).

TABLE 2: NUMBER OF STATES OPPOSING PUNISHMENTS CONSIDERED BY THE COURT (CONT.)

Case	State-Counting Analysis	Opposing States	Punishment	Ruling
<i>Tison v. Arizona</i> (1987)	4 + 2 + 6 + 6 + 3 = 21 states fall into categories that could impose a similar punishment. Only 11 states permitting the death penalty would forbid its application here. ⁴⁷	11	Death Penalty for Felony Murderer with Reckless Indifference	Upheld
<i>Thompson v. Louisiana</i> (1988) (plurality opinion)	14 states forbid the death penalty and 18 others have a minimum age of sixteen. ⁴⁸	32	Death Penalty for Fifteen-Year-Olds	Struck Down
<i>Atkins v. Virginia</i> (2002)	12 states forbid the death penalty and 18 others (and the federal government) forbid it for “mentally retarded” individuals. ⁴⁹ And only 5 have executed such individuals since 1989. ⁵⁰	30 ⁵¹	Death Penalty for “Mentally Retarded” Individuals	Struck Down
<i>Roper v. Simmons</i> (2005)	12 states forbid the death penalty, 18 others forbid it for juveniles, and only 3 executed juveniles in the past ten years. ⁵²	30 ⁵³	Death Penalty for Juveniles	Struck Down
<i>Kennedy v. Louisiana</i> (2008)	“[I]t is of significance that, in 45 jurisdictions [including the federal government], petitioner could not be executed for child rape of any kind.” ⁵⁴	44	Death Penalty for Nonhomicide Offenders	Struck Down
<i>Graham v. Florida</i> (2010)	“Thus, only 12 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders . . . while 26 States as well as the District of Columbia do not impose them despite apparent statutory authorization.” ⁵⁵	38	Life Without Parole for Juvenile Nonhomicide Offenders	Struck Down

⁴⁷ *Tison v. Arizona*, 481 U.S. 137, 152–54 (1987).

⁴⁸ *Thompson v. Louisiana*, 487 U.S. 815, 826–29 (1988).

⁴⁹ *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (citing *Atkins v. Virginia*, 536 U.S. 304, 313–15 (2002)).

⁵⁰ *Atkins*, 536 U.S. at 316.

⁵¹ For the *Kennedy* count, see 554 U.S. at 426.

⁵² *Roper*, 543 U.S. at 564–65.

⁵³ For the *Kennedy* count, see 554 U.S. at 426.

⁵⁴ *Id.* at 426.

⁵⁵ *Graham v. Florida*, 560 U.S. 48, 64 (2010).

Table 2 yields several insights. First, the Court's severe restrictions on the death penalty in *Furman* represented a significant departure from the norm. Consider Justice Marshall's count of 9 opposing states. In *Tison*, the Court held that 11 opponents were insufficient to render a punishment unconstitutional. And even Justice Brennan's more generous count of 21 states was below a majority. Thus, it should come as no surprise that the Court abandoned *Furman* four years later, after 35 states and Congress had indicated their continued support for the death penalty.⁵⁶

Second, the Court has generally adopted a supermajority threshold for determining that a punishment is unconstitutional. After the Court's repudiated decision in *Furman*, the fewest number of opposing states that were sufficient to strike down a punishment was 30 in *Atkins* and *Roper*. Even in those cases, accounting for states' abandonment of sentencing regimes still on the books leads to a count of 45⁵⁷ and 47⁵⁸ opposing states, respectively. Granted, this analysis is not an exact science. There is a limited sample size and the Court has cautioned that state counting is not dispositive on the outcome.⁵⁹ However, the Court has found it appropriate to compare the number of states opposing a practice in the present case with the number found sufficient for unconstitutionality in previous cases.⁶⁰

Third, the Court has employed several different means of counting states. *Ford v. Wainwright* provides the simplest method: directly counting the number of states that prohibit a specific punishment.⁶¹ Other cases raise more complexities. In *Gregg v. Georgia* and *Atkins v.*

⁵⁶ See *supra* text accompanying note 41; Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1783 n.118 (2011) (discussing the American people's response to *Furman*).

⁵⁷ This number comes from subtracting from the 50 total states the 5 states that executed "mentally retarded" individuals between 1989 and *Atkins*. See *supra* text accompanying note 50.

⁵⁸ This number comes from subtracting from the 50 states the 3 states that executed juvenile defendants in the ten years before *Roper*. See *supra* text accompanying note 52.

⁵⁹ See *Kennedy*, 554 U.S. at 426 (noting that "our review of national consensus is not confined to tallying the number of States with applicable death penalty legislation").

⁶⁰ *Id.* (making comparisons with *Atkins*, *Roper*, and *Enmund*).

⁶¹ 477 U.S. 399, 408 (1986).

Virginia, the Court emphasized the trend of states responding to a Court decision.⁶² In cases like *Atkins*, *Roper v. Simmons*, and *Kennedy v. Louisiana*, the Court summed the states banning the death penalty altogether with those that permit the death penalty but not for the relevant type of defendant.⁶³ Finally, Justice Brennan’s concurrence in *Furman v. Georgia* and *Graham v. Florida* considered states’ general usage of a punishment,⁶⁴ while cases like *Atkins* and *Roper* focused on the usage in some range of years preceding a case.⁶⁵ These myriad counting methods raise intriguing questions that Part III seeks to answer.

III. QUESTIONS ABOUT COUNTING METHODOLOGIES

The practice of state counting in Eighth Amendment cases has understandably received criticism from myriad perspectives. Justice Samuel Alito (joined by Scalia) has criticized perceived inconsistencies and evolutions in the Court’s counting methodologies.⁶⁶ Tonja Jacobi has called for the Court to abandon looking at state legislation altogether, arguing that it undermines federalism, results in subjective counting methods, and does not yield clear rules.⁶⁷ I agree with Alito, Scalia, and Jacobi on the importance of having objective and clear rules for judges to determine the constitutionality of punishments. However, I assume in this Part that some form of state counting is appropriate for discerning whether punishments are “unusual.” I thus proceed to address specific questions about how exactly to count states, importing my Article V and Section 5 Rules from the previous Chapter and criticizing the Court’s and scholars’ support for analyzing trends in state practices.

⁶² *Atkins v. Virginia*, 536 U.S. 304, 315–16 (2002); *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976) (plurality opinion).

⁶³ *Kennedy v. Louisiana*, 554 U.S. 407, 426 (2008); *Roper v. Simmons*, 543 U.S. 551, 564–65 (2005) (citing *Atkins*, 536 U.S. at 313–15).

⁶⁴ *Graham v. Florida*, 560 U.S. 48, 64 (2010); *Furman v. Georgia*, 408 U.S. 238, 298 n.53 (1972) (Brennan, J., concurring).

⁶⁵ *Roper*, 543 U.S. at 564–65; *Atkins*, 536 U.S. at 316.

⁶⁶ *Miller v. Alabama*, 567 U.S. 460, 510–15 (2012) (Alito, J., dissenting).

⁶⁷ See generally Jacobi, *supra* note 32.

In a two-part series following *Atkins v. Virginia*, Akhil Reed Amar and Vikram David Amar raised and answered several questions about state counting in Eighth Amendment contexts.⁶⁸ I discuss their answers to four of these questions.

First, the Amars ask whether states that have abolished the death penalty completely (so-called “abolitionist states”) should factor into a state-counting analysis regarding the application of the death penalty to a specific type of defendant—like those considered “mentally retarded.”⁶⁹ Recall that in *Atkins*, *Roper v. Simmons*, and *Kennedy v. Louisiana*, the Court did consider the abolitionist states as part of the punishment’s opponents.⁷⁰ The Amars persuasively defend this reasoning. Not only does it reflect *a fortiori* logic—states that oppose the death penalty in all cases by a stronger reason oppose it in the specific case of a “mentally retarded” defendant—but it also aligns with common sense.⁷¹

Consider a situation in which Wyoming, Vermont, and Alaska are the only states that permit the death penalty. If Wyoming and Vermont permit it also for specific defendants, those two states’ practices cannot plausibly demonstrate the death penalty’s usualness for those types of defendants. However, champions of excluding abolitionist states like Scalia would claim that Wyoming and Vermont represent a 67% supermajority for sentencing those defendants to death.⁷² Using such a small sample size would allow a small minority of states to misrepresent a national consensus,

⁶⁸ Akhil Reed Amar & Vikram David Amar, *Eighth Amendment Mathematics (Part One): How the Atkins Justices Divided While Summing*, FINDLAW (June 28, 2002), <https://supreme.findlaw.com/legal-commentary/eighth-amendment-mathematics-part-one.html> [hereinafter *Eighth Amendment Mathematics (Part One)*]; Akhil Reed Amar & Vikram David Amar, *Eighth Amendment Mathematics (Part Two): How the Atkins Justices Divided While Summing*, FINDLAW (July 12, 2002), <https://supreme.findlaw.com/legal-commentary/eighth-amendment-mathematics-part-two.html> [hereinafter *Eighth Amendment Mathematics (Part Two)*].

⁶⁹ Amar & Amar, *Eighth Amendment Mathematics (Part One)*, *supra* note 68.

⁷⁰ See *supra* text accompanying note 63.

⁷¹ Amar & Amar, *Eighth Amendment Mathematics (Part One)*, *supra* note 68.

⁷² *Id.*

producing a counterintuitive and unreasonable result that undermines the Eighth Amendment’s text.

Second, the Amars ask whether each state’s practice should be given equal weight or whether they should be weighted by population (a scheme that would give California’s practices roughly sixty-seven-times greater weight than Wyoming’s, based on the two states’ populations).⁷³ Because of the ordinary meaning of the word “unusual,” they support the latter option.⁷⁴ About a decade later, Akhil Amar added a persuasive insight to this debate. Cases involving state punishments technically involve the Fourteenth Amendment, which incorporates the Eighth Amendment to the states.⁷⁵ The Fourteenth Amendment grants Congress the power to enforce its provisions “by appropriate legislation.”⁷⁶ Given that one chamber of Congress, the House, reflects differences in state population, unusualness determinations should also weigh states by population.⁷⁷

That conclusion segues nicely into the next question: what threshold of state opposition to a practice is necessary to render it unusual? While the Amars do not provide a definitive answer,⁷⁸ Akhil Amar has written that “judges should look for the same kind of broad national support for a new right that would warrant a properly motivated and smoothly functioning Congress to recognize the right under its own authority.”⁷⁹ This approach makes sense given Congress’s enforcement power over the Fourteenth Amendment.⁸⁰ However, an objective standard for discerning whether national support tantamount to a congressional majority exists is necessary to

⁷³ For the states’ estimated populations in 2023, see Amy Tikkanen, *List of U.S. States by Population*, BRITANNICA (Jan. 17, 2024), <https://www.britannica.com/topic/largest-U-S-state-by-population>.

⁷⁴ Amar & Amar, *Eighth Amendment Mathematics (Part One)*, *supra* note 68.

⁷⁵ See *Robinson v. California*, 370 U.S. 660, 666–67 (1962) (incorporating the Eighth Amendment against the states).

⁷⁶ U.S. CONST. amend. XIV, § 5.

⁷⁷ Amar, *supra* note 56, at 1780.

⁷⁸ Amar & Amar, *Eighth Amendment Mathematics (Part One)*, *supra* note 68.

⁷⁹ Amar, *supra* note 56, at 1782.

⁸⁰ See *supra* text accompanying notes 75–77.

provide clear guidance to judges, lest they smuggle their subjective opinions into a vague framework.⁸¹

Consistent with Chapter Two’s analysis of thresholds for unenumerated rights, I would offer two suggestions here—either of which would be sufficient for finding unusualness and both of which reduce subjectivity. First, punishments banned by (1) states whose combined representation in the House forms a majority, (2) twenty-six states, representing a Senate majority, and (3) states representing an Electoral College majority should be considered “unusual” under the Eighth Amendment. These standards aim to mimic the House, Senate, and presidential approval necessary to pass a law.⁸² I refer to this formula as the Section 5 Rule. Second, punishments banned by three-fourths of states—the number Article V requires to ratify a constitutional amendment⁸³—could also be considered unusual. This threshold reflects my Article V Rule.

The fourth question that the Amars ask is whether recent trends should be considered in analyses of “unusual” practices.⁸⁴ For example, the Court in *Gregg v. Georgia* found it significant that 35 states and Congress had passed legislation authorizing the death penalty in the four years following *Furman v. Georgia*.⁸⁵ Here, the Amars correctly urge caution regarding the use of recent trends. If the number of states banning a practice increased from 3 to 15 in a decade—setting aside issues of weighing by population—it would be more accurate to describe that practice as “less common” than truly “unusual.”⁸⁶ Thus, the Amars argue that trends should be considered when “the existence of a current consensus is otherwise unclear”—in other words, as a sort of tiebreaker.⁸⁷

⁸¹ For a criticism of the Court’s state-counting practices along these lines, see *supra* note 66.

⁸² See U.S. CONST. art. I, § 7, cl. 2.

⁸³ *Id.* art. V.

⁸⁴ Amar & Amar, *Eighth Amendment Mathematics (Part Two)*, *supra* note 68.

⁸⁵ *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976) (plurality opinion).

⁸⁶ Amar & Amar, *Eighth Amendment Mathematics (Part Two)*, *supra* note 68.

⁸⁷ *Id.*

I am a little more skeptical of using changes in direction. For one thing, there exist areas of the law where we do not rely on trends to anticipate future results. If a bill received 5% support in the House and Senate five years ago and 45% this year, nobody would point to that trend and begin enforcing that bill’s provisions as if they were law. Similarly, lower courts should not abandon Supreme Court precedent in anticipation of changing doctrine given shifts in the Court’s composition.⁸⁸ However, one arena in which state trends may be useful is with respect to “judicial lock-ins.”⁸⁹ Consider a situation in which the Court bans a method of punishment. Automatically, that method becomes “unusual” because states must comply with the Court’s ruling. However, that “unusualness” would not necessarily reflect a national consensus. If a group of daring states decided to challenge the Court’s ruling—by enabling that punishment X years from now or conditional upon the Court’s reconsideration—the Court would be wise to respond to that trend.⁹⁰

* * *

The point of the preceding analysis is not to document exhaustively the mathematical intricacies of state-counting methods. Rather, by asking and answering questions that some of the justices themselves have raised, it aims to lay a foundation for future decisions that employ a more rigorous and objective state-counting practice that judges and litigants can more easily apply.⁹¹

CONCLUSION

The U.S. Supreme Court’s Eighth Amendment jurisprudence demonstrates that states can have a profound influence on national constitutional rights. They played a key role in ending

⁸⁸ See, e.g., *Memphis Center for Reproductive Health v. Slatery*, 14 F. 4th 409, 441–57 (6th Cir. 2021) (Thapar, J., concurring in judgment in part and dissenting in part) (criticizing the Court’s abortion jurisprudence but applying it as binding precedent).

⁸⁹ See, e.g., Amar & Amar, *Eighth Amendment Mathematics (Part Two)*, *supra* note 68; Amar, *supra* note 56, at 1782–83.

⁹⁰ Amar, *supra* note 56, at 1783.

⁹¹ See, e.g., Amul R. Thapar & Benjamin Beaton, *The Pragmatism of Interpretation: A Review of Richard A. Posner, The Federal Judiciary*, 116 MICH. L. REV. 819, 820 (2018) (“Litigants, lawyers, and judges depend on the stability and ascertainability of the law.”).

capital punishment for “mentally retarded” individuals, juveniles, and nonhomicide offenders.⁹² And while methodological disagreements have arisen about how to count states,⁹³ there exists widespread agreement that state practices are important in ascertaining whether a punishment is “unusual” under the Amendment.

This Chapter’s analysis will undoubtedly have continued relevance in the years to come. For example, Florida has sought to challenge *Kennedy v. Louisiana*⁹⁴ by approving the death penalty for the nonhomicide offense of child rape.⁹⁵ If enough states follow Florida’s example such that the Article V and Section 5 Rules are no longer satisfied, the Court may see fit to overrule *Kennedy*, just as it overruled *Furman v. Georgia*⁹⁶ following state opposition.⁹⁷ Indeed, the Court’s embrace of the death penalty in *Gregg v. Georgia*⁹⁸ four years after seemingly extinguishing it in *Furman* demonstrates more broadly how states can push back against Court decisions and achieve meaningful change. Those who despair at national mandates from the Court should not give up hope. Instead, they should channel their passions into building a national consensus from the ground up, one state at a time.

⁹² See generally *supra* Table 2.

⁹³ See generally *supra* Part III.

⁹⁴ 554 U.S. 407 (2008).

⁹⁵ Rose Horowitz, *DeSantis Expands Death Penalty to Include Child Rape, Setting up Likely Court Challenge*, CBS NEWS (May 2, 2023, 12:01 PM), <https://www.nbcnews.com/politics/politics-news/desantis-expands-death-penalty-include-child-rape-setting-likely-court-rna82413>.

⁹⁶ 408 U.S. 238 (1972).

⁹⁷ See, e.g., *supra* text accompanying notes 56, 85.

⁹⁸ 428 U.S. 153 (1976).

CONCLUSION

States matter. State constitutions matter, state laws matter, state practices matter. Throughout American history, they have mattered in rights-expanding ways. Wielding their influence via Article V of the United States Constitution, states inspired our cherished protections in the Bill of Rights, helped extirpate slavery from this country, and expanded the franchise to previously excluded segments of the population. In demonstrating the rights “deeply rooted in this Nation’s history and tradition,”¹ states have led the U.S. Supreme Court to expand privacy and gun rights and require states to protect more provisions in the Bill of Rights via incorporation. By showing the nation what practices are “unusual punishments” forbidden by the Eighth Amendment,² states have expanded both victims’ rights by restoring the death penalty generally and some groups of defendants’ rights by sparing them from death sentences. Whether or not one favors these developments normatively, it is undeniable that states have—since the Founding—played a significant role in driving national change.

In rejecting the narrative of states as solely obstructing national progress, this Essay has made several important contributions to scholarship regarding federalism and constitutional law. Instead of focusing on amendments’ interpretations or consequences, Chapter One highlighted the processes that produced them. It synthesized the stories of amendments from the Founding to the twentieth century into a cohesive tale about states producing national change. While much has changed since 1787, states have remained front and center in the stories of constitutional amendments.³

¹ *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) ((quoting *Moore v. East Cleveland*, 431 U. S. 494, 503 (1977) (plurality opinion)).

² U.S. CONST. amend. VIII.

³ States’ continuous role in driving constitutional amendments may also undermine Bruce Ackerman’s innovative division of American constitutional history into three distinct periods, with the Founding, Reconstruction, and the New Deal as “the three great turning points.” BRUCE ACKERMAN, *WE THE PEOPLE 1: FOUNDATIONS* 58 (1991). After

Chapter Two presents multiple important insights that may affect future court rulings, state legislation, and activists' campaigns. After providing a solid originalist foundation for counting state practices to discern national unenumerated rights, it proposes and analyzes the Article V and Section 5 Rules. These novel Rules provide the best guidance for courts engaging in a state-counting analysis to determine if the states have demonstrated sufficient support for judicial enforcement of a new right. They reflect the Constitution's text, history, and structure, while recognizing the importance of clear, administrable rules that prevent judges from legislating from the bench.

My Rules have implications beyond judicial decision-making. Their adoption would spur greater dialogue between federal courts on the one hand, and state courts and legislatures on the other. Instead of waiting endlessly for the Court's composition to change, politicians and ordinary citizens could channel their opposition to Court mandates into democratic state processes, potentially forcing the unelected Court to respond to We the People's will.

The ability of states to challenge federal mandates through legal challenges⁴ applies not just to unenumerated rights, but also to criminal sentences—as Chapter Three demonstrated. Indeed, Eighth Amendment litigation has produced some of the clearest examples of states persuading the Court to reverse course. As noted in Chapters Two and Three, thirty-five states led

all, states represent at least one constant in effecting constitutional change across all three periods. I thank Steven G. Calabresi for offering a similar insight regarding the Twenty-Seventh Amendment, which was proposed by Congress in 1789 and ratified by three-quarters of states in 1992—spanning all three of Ackerman's periods. For the 1789 and 1992 dates, see AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 453 (2005).

⁴ For a brief discussion of states' role in this regard, see Vikram David Amar & Michael Schaps, *When the Supreme Court Overrules a Prior Constitutional Case, Has the Meaning of the Constitution Itself Changed? A Georgia Abortion Dispute Raises the Question*, JUSTIA (Dec. 2, 2022), <https://verdict.justia.com/2022/12/02/when-the-supreme-court-overrules-a-prior-constitutional-case-has-the-meaning-of-the-constitution-itself-changed> (discussing the importance of state statutes producing “test cases” in the “laboratory of federalism”).

the Court to reconsider its opposition to the death penalty within four years.⁵ The two Chapters tie together nicely as well in that the latter demonstrates an additional application of the Article V and Section 5 Rules to Eighth Amendment cases.

Chapter Three makes a crucial independent contribution too. By presenting the number of states that opposed a sentencing practice across eleven cases, the Chapter enables future litigants and jurists to conduct a more rigorous and exact analysis of whether a punishment is unusual under the Eighth Amendment. In doing so, I join Justice Samuel Alito’s call for greater consistency and objectivity in the Court’s state-counting practices;⁶ indeed, faithful implementation of the Article V and Section 5 Rules would deliver these ideals. However, assuming that the Court adheres to its precedents, it would be hard for states to defend criminal punishments that thirty states oppose, since that threshold was sufficient to strike down sentences in *Atkins v. Virginia* and *Roper v. Simmons*.⁷

Although this Essay has discussed three important mechanisms through which states have made key contributions nationally, there exist additional constitutional provisions that empower states. One area that has attracted attention recently is the extent of state authority over elections. Under Article I of the Constitution, states can determine “[t]he Times, Places and Manner of holding Elections for Senators and Representatives”⁸ and the means of selecting their members in the Electoral College.⁹ In 2023, the Court interpreted the provision governing legislative elections

⁵ See *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976); see also Akhil Reed Amar, *America’s Lived Constitution*, 120 *YALE L.J.* 1734, 1783 n.118 (2011) (discussing the American people’s response to *Furman v. Georgia*, 408 U.S. 238 (1972)).

⁶ *Miller v. Alabama*, 567 U.S. 460, 510–13 (2012) (Alito, J., dissenting).

⁷ See *Kennedy v. Louisiana*, 554 U.S. 407, 426 (2008) (counting the number of states deemed sufficient in *Atkins* and *Roper*). This analysis sets aside the possibility that the federal government permits the punishment but at least thirty states oppose it, a scenario that raises questions about the weight of collective state practices versus the federal practice.

⁸ U.S. CONST. art. I, § 4, cl. 1.

⁹ *Id.* art. II, § 1, cl. 2.

to empower not only state legislatures—who are mentioned explicitly in that clause—but also state courts conducting judicial review.¹⁰ Although the Court held that state courts “do not have free rein,”¹¹ Vikram David Amar argues that permissible federal review of state court decisions is narrow in scope.¹² In other words, states have significant discretion in determining the “Times, Places and Manner” of holding federal legislative elections, free from federal interference. Additionally, the Constitution ties voting eligibility for U.S. House and U.S. Senate elections to the qualifications each state imposes for the largest branch of its state legislature.¹³ Thus, individual states could constitutionally permit sixteen-year-olds¹⁴ or noncitizens to vote in federal elections.¹⁵

As the salience of election-law issues demonstrates, questions about the extent of state authority and states’ abilities to influence national policy remain central to contemporary constitutional and political disputes.¹⁶ While the Constitution imposes limits on state power, jurists, litigants, policymakers, and campaigners should not ignore the numerous ways in which the document empowers states to influence national legal protections and policy. After all, this Essay has provided scores of historical examples in which states have pioneered and helped secure some of We the People’s most treasured rights.

¹⁰ 143 S. Ct. 2065, 2081 (2023).

¹¹ *Id.* at 2088.

¹² Vikram David Amar, *The Moore the Merrier: How Moore v. Harper’s Complete Repudiation of the Independent State Legislature Theory Is Happy News for the Court, the Country, and Commentators*, 2023 CATO SUP. CT. REV. 275, 283–96.

¹³ See U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII, § 1.

¹⁴ Democratic Rep. Grace Meng of New York has proposed a constitutional amendment to enshrine the right to vote for sixteen-year-olds nationally. See H.J. Res. 16, 118th Cong. (2023).

¹⁵ I thank Steven G. Calabresi for this point.

¹⁶ As an additional example, the federal government and Texas have been arguing over the latter’s ability to combat illegal immigration through state law. See, e.g., Jess Bravin & Elizabeth Findell, *Border Enforcement in Disarray as Courts Debate Texas’ Power to Arrest, Deport Immigrants*, WALL ST. J. (Mar. 20, 2024, 1:11 AM), <https://www.wsj.com/us-news/law/supreme-court-ruling-deportation-texas-sb4-f8328b6d>.

ACKNOWLEDGMENTS

This Essay benefited greatly from my conversations with Professor Akhil Reed Amar, Professor Steven G. Calabresi, Benjamin Daus, Jordan Kei-Rahn, Professor David R. Mayhew, Caroline Parker, the Honorable Amul R. Thapar, and Derek A. Webb, as well as helpful comments and suggestions on early drafts by Professor Mayhew and Kevin Xiao.¹ Yet this Essay is not just an academic work; it also represents the culmination of my undergraduate years. In that latter capacity, it would not have been possible without the contributions of myriad individuals whom I have had the pleasure of knowing before and during the last four years. These people have made me a better person and scholar, and I am forever grateful.

My advisor, Professor Calabresi, has been endlessly supportive amidst the ups and downs of my undergraduate years and patient with my questions and curiosities. With his kindness and knowledge, he is a role model for any aspiring academic. Along with Professor Mayhew, Professor Calabresi was instrumental in making me feel like I belonged at Yale. I thank Professor Mayhew for providing a constant source of conversation and insight on contemporary politics. Some of the most formative experiences of my undergraduate years occurred due to his support. It has been an honor to learn from and work for him.

I owe much of my early legal career to the support and guidance of Ben Daus, who nurtured my interest in constitutional law from my very first class at Yale College. Ben and Professor Akhil Amar inspired me to think deeply about the text, history, and structure of constitutional provisions, especially those that receive little attention in the news or the academy. They have instilled in me a lifelong passion for constitutional law. I am indebted as well to Professor and former Dean

¹ All views and errors are, of course, my own.

Vikram D. Amar, who gave me my first opportunity to write serious legal scholarship and whose encouragement and advice remain indispensable to my legal endeavors.

I am grateful also to the judges who gave me opportunities that I could never have dreamed of as an undergraduate student. Judge Thapar embodies the best qualities in a jurist: he is a kind man and a dedicated public servant who works tirelessly to get the law right. His example, encouragement, and enthusiasm impact me every day. I have benefited immensely as well from the experience, wisdom, and wit of the Honorable Stephen P. McGlynn, who took a chance on me as a sophomore and has made an indelible mark on my personal and professional life. He showed me just how much I enjoyed reading and writing about the law and gave me confidence in my abilities to do so.

While this Essay owes much to those whom I have met during my time in college, my academic journey began long before I stepped foot in New Haven. In high school, Ryan Dean gave me my first opportunity to write a serious research paper. The impact of his cheerleading during and after that project can be felt in every substantial writing endeavor I have undertaken. Closer to home, my parents, Dr. Amy W.K. Liu and Dr. Dicky C.K. Yan, have gone above and beyond in giving me opportunities that I was the luckiest child in the world to have. I thank them not only for their unwavering support for my education, but also for their constant encouragement to enjoy life as much as I can.

Those who know me know that I care deeply for my friends, whom I will never be able to repay for their impact on my life. Caroline Parker embodies the values that I hold dear: kindness, care, respect, decency, courteousness, integrity, dignity, and hard work. She inspires me to be a better person, friend, and scholar every single day. Her intellect, knowledge, niche interests, genuineness, insightfulness, brilliance, and love for cats have made my undergraduate years

infinitely more enjoyable and intellectually stimulating. None of my undergraduate endeavors would have been possible without Julia Sulkowski, who is always there for me and has gone above and beyond to take care of me. Her enthusiasm and kindness are unparalleled. Madeline Levin has been an unceasing source of support during the most challenging times of high school and college, and Zoe Robertson has been an indispensable friend and cheerleader. I thank Zoe for always helping me keep things in perspective and—along with Caroline, Julia, and Madeline—encouraging me to be proud of my achievements.

It is always a risk to acknowledge people by name, for fear of making unfortunate omissions. I have undoubtedly missed some individuals to whom I owe much, for which I apologize. However, a few more expressions of gratitude are necessary. Elizabeth Blair, Caroline Fenyo, Erica Fenyo, Ken Fenyo, and Meredith Fenyo graciously opened their home to me for sports games, board games, video games, holiday meals, and superb desserts. And each of the following individuals, whether they know it or not, contributed in their own way to my undergraduate journey: Ethan Cohen, Makayla Conley, Michael Cook, Tori Cook, Dr. Maura Cremin, Rachel L. Daley, Taylor Dallin, Andrew Ehrgood, Dr. Amir Shawn Fairdosi, Justin Ferrugia, Nicholas M. Gallagher, the Honorable William I. Garfinkel, Liz Grant, Anthony R. Guttman, Joshua A. Hanley, Abby Holland, Dr. Krystyna Illakowicz, Grace Klise, William Kwong, Lauren Lax, Avery Lee, James Rex Lee, Whitney Leets, Adam Reed Moore, Kyra Pretre, Elsie Ragatz, Carly Retterer, Julian Darius Revie, Sam Rosenberg, Ava Saylor, Sydney Scheller, Mary Margaret Schroeder, Dr. Gordon Silverstein, Bradley D. Simon, Michael Thibodeaux, Caroline Thomason, Olivia Velten-Lomelín, Reese Weiden, and Karolina Wojteczko.

Finally, I wish to thank the canines who brought me so much joy and showed me unconditional love, even when I was thousands of miles away. Luna, Nibbles, Hank, Poppy, and Tucker, I love you with my whole heart.